(19,276.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 212.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE H. DASHIELL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the circuit court of the United States, northern district of Texas	1	1
Caption	1	1
Plaintiff's first amended original petition	1	2
Defendant's second amended original answer	5	5
Plaintiff's first supplemental petition	8	7
Defendant's supplemental answer	14	13
Original release, executed by G. H. Dashiell	14	14
Final judgment	16	15
Defendant's amended motion for new trial	17	16
Order overruling motion for new trial and extending time to file bill of exceptions	18	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 22, 1904.

	Original.	Print
Bill of exceptions	19	18
Testimony of J. L. Cheek, for plaintiff	20	19
S. D. Haire, for plaintiff	24	22
W. M. Petry, for plaintiff	25	23
E. J. Pring, for plaintiff	27	25
D. J. Aber, for plaintiff	28	25
Dr. J. T. Fields, for plaintiff	28	26
Dr. W. C. Mullins, for plaintiff	30	28
Dr. C. E. Frost, for plaintiff	32	29
Dr. J. M. Borders, for plaintiff	35	32
W. A. Redford, for plaintiff	37	33
Dr. R. D. Talbot, for plaintiff	38	34
Dr. C. O. Harper, for plaintiff	40	36
J. B. Aldrich, for plaintiff	42	38
H. T. Shahan, for plaintiff	43	38
J. P. Naylor, for plaintiff	43	39
Henry S. Lane, for plaintiff	45	40
C. W. Dashiel, for plaintiff	46	41
Mrs. M. J. Dashiel, for plaintiff	48	43
L. M. Whitsitt, for plaintiff	51	45
James Madison, for defendant	53	47
O. J. Kincade, for defendant	57	50
Dr. G. H. Fitzgerald, for defendant	60	53
Dr. G. V. Morton, for defendant	67	59
S. M. Berry, for defendant	62	55
L. C. Schwick, for defendant	64	56
D. Elliott, for defendant	68	60
Mrs. A. J. Smith, for defendant	69	60
Pat. Shea, for defendant	70	61
J. O. Bowles, for defendant	73	64
J. W. Ward, for defendant	75	65
Dr. Bacon Saunders, for defendant	79	69
W. R. Scott, for defendant	82	71
F. T. Scott, for defendant	83	73
J. L. Cheek (in rebuttal)	84	74
William Childress, for plaintiff (in rebuttal)	85	74
Release executed by George H. Dashiel, offered by defendant	87	76
Letter to J. M. Ward, superintendent of T. & P. R. R., from G. H. Dashiel, offered by defendant	88	77
Application to Texas & Pacific Ry. Co. of G. H. Dashiel for situation as brakeman	89	77
Letter to J. W. Ward, superintendent of T. & P. R. R., from G. H. Dashiel, offered by defendant	97	85
Application of G. H. Dashiel to El Paso & N. E. Ry. for employment, offered by defendant	97	85
List of checks paid Geo. H. Dashiel on account of wages while in employ of Texas & Pacific Ry. Co., offered in evidence by defendant	99	86
Rules 13 and 14 of rules of the railway company, &c	99	87
Charges to jury requested by defendant and refused	100	87
Charges to jury	101	89

	Original.	Print
Assignments of error	109	95
Petition for writ of error and order allowing	114	99
Bond	115	100
Writ of error	116	101
Citation and service	118	102
Agreement as to transcript	119	103
Clerk's certificate	120	104
Argument in part	121	104
Submission	121	104
Final judgment	121	105
Opinion of the court	123	105
Assignment of errors	130	110
Bond	136	114
Clerk's certificate	137	115
Writ of error	138	116
Citation	139	117

a Caption.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1903, and held in the court room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE H. DASHIELL, Defendant in Error. } No. 1278.

Be it remembered that heretofore, to-wit: on the 7th day of July, 1903, a transcript of the record of the above styled cause from the circuit court of the United States for the northern district of Texas, was filed in the office of the clerk of said United States circuit court of appeals for the fifth circuit, in the words and figures following, to-wit:

1 Caption.

Be it remembered, that at a term of the circuit court of the United States, in the fifth circuit thereof, and in and for the northern district of Texas, begun and holden at Fort Worth, Texas, on the 9th day of March, A. D. 1903, and which term adjourned on the 11th day of April, A. D. 1903, the Hon. Edward R. Meek, United States district judge for the northern district of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to-wit:

GEORGE H. DASHIELL, by Next Friend,
versus
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 252.

Plaintiff's First Amended Original Petition.

Filed December 20th, 1902.

In the Circuit Court of the United States for the Northern District of Texas, Sitting at Fort Worth.

GEO. H. DASHIELL, by His Next Friend, Mrs. MARY J. Dashiell,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 252.

Now comes the plaintiff, Geo. H. Dashiell, by his next friend and mother, Mrs. Mary J. Dashiell, and leave of court having been first obtained, files this his first amended original petition, amending his original petition heretofore filed herein in the district court of Tarrant county, Texas, on to-wit: the 9th day of August, 1902, before said cause was removed by defendant to this honorable court, so that his pleadings may hereafter be as follows, to-wit:

2 To the Honorable E. R. Meek, judge of said court:

Your petitioner, Geo. H. Dashiell, who sues herein by his mother and next friend, Mrs. Mary J. Dashiell, hereinafter styled plaintiff, complaining of the Texas & Pacific Railway Company, hereinafter styled defendant, would respectfully show as follows, to-wit: That both plaintiff and his said next friend are resident citizens of the county and State, and of the district aforesaid, and were such at the time of the commission of the wrongs, negligence and injuries hereinafter complained of, and that defendant is a railway corporation duly incorporated under and by virtue of the laws of the United States of America, and, that it has a local agent in the city of Fort Worth, said county, John G. Harris, being said agent.

That continuously since the 24th day of December, 1900, the date of the collision occasioned by defendant's negligence and the consequent personal injuries to plaintiff hereinafter complained of, plaintiff has been of unsound mind to such a degree as to render him wholly incapable of transacting his business affairs and of making any valid contract or agreement relative to his cause of action herein averred and of managing any of the details and matters usually and necessarily connected with prosecution of such claims and causes of action, and that for a great part of the time since said 24th day of December, plaintiff has been a *non-compos mentis*, and always since said date has been of weak and unsound mind and incapable, mentally, of transacting any kind of business as aforesaid, and that such

is now his condition; that ever since said 24th day of December, plaintiff has been and is now unsound in mind, a *non-compos mentis* and a lunatic, but that he has never by any court been so adjudged nor has any court appointed a guardian for him, and suing herein by his mother and next friend, as aforesaid, there exists no necessity for a guardian to be appointed for him in order to protect his property and rights, growing and to grow out of said collision, negligence and injury complained of.

That on said 24th day of December, 1900, defendant owned, operated and maintained its certain line of railway extending through the county of Eastland, Texas, and between the towns of Eastland and Ranger, in said county, and that on said date plaintiff was employed by defendant in the capacity of a conductor of a freight train and while so engaged and while then and there assisting in operating a freight train and cars of defendant, and while running said train and cars in an easterly direction between said towns, he was then and there, through the negligence and carelessness of defendant and of its agents and employés engaged in the work of operating another train of
3 cars then and there being run and moved behind plaintiff's train and in the same direction as was the train about which plaintiff was engaged, as aforesaid, collided with, with great force and violence, when and where and whereby plaintiff was seriously, painfully and permanently injured in many parts of his body and especially was he so injured in and about the head, eyes, back, sides, arms and shoulders, and in the organs and functions of his brain and in his entire mental and nervous system and that as a result of said injuries plaintiff has, since the reception thereof, now is, and in the future will permanently be helpless, injured and unsound of mind and body, and wholly incapable of transacting any kind of business or of doing any kind of mental or manual work and that he now is and for the remainder of his life will be cared for and protected, if at all, by his friends and relatives.

That as a result of said negligence and collision, plaintiff further says that he was badly burned about the legs, sides, back, arms, hands and head, and that his left eye has become seriously affected by reason of said injury thereto and by reason of said injury to his head and nervous system affecting said eye, in so much that the value, use and sight of said eye is now greatly impaired and almost entirely lost, and that the sight of his right eye is also now considerably weakened and impaired by reason of its sympathy for his said left eye. That as a result of said negligence and injury plaintiff now suffers, has suffered and for all his life will continue to suffer great physical pain and much mental anguish and *paid* [pain].

That when injured plaintiff was earning $100.00 or more per month, and that his capacity to labor by mind or body and his capacity to earn money has been by reason of said injury totally and permanently destroyed.

That when injured, as aforesaid, plaintiff was a young man only

37 years of age, strong, healthy and robust, very industrious and of good moral and business habits and had a life expectancy at said time of about 32 years.

That defendant and its said employés then and there operating said train of cars that collided with plaintiff's train, as aforesaid, were negligently running the same with cars in front of the engine, the same being then and there pushed instead of pulled by said engine, and at a high, excessive and dangerous rate of speed, and were then and there also negligent in not maintaining a sufficient watch or lookout as to where, or into what the same was running and was about to run, and were also guilty of gross negligence towards plaintiff in that the brakeman of said colliding train, whose duty
4 it was then and there to be at work and on guard on the caboose or front of his said train, the part thereof next to plaintiff's said train, while the same was being pushed backwards as aforesaid, had then and there wholly and negligently abandoned his said post of duty and had then and there negligently placed in his stead a man almost, if not wholly, unfamiliar with the railway track of defendant at point of and for many miles west of said colliding place, and who was also weak of eyesight and incapable of seeing plaintiff's said train, until too close to same to give protection to either of the said trains and who was wholly incompetent physically and otherwise to fill the position of brakeman on said colliding train, and especially the position of said head end brakeman, at the time of the aforesaid collision, and plaintiff says that all of the aforesaid acts and omissions on the part of defendant and its said employés were gross negligence and that said negligence proximately caused said collision and injury. That said brakeman, one Wm. Childress, who was out of his regular duty and work and was negligently acting as said head end brakeman at time and place of said collision as aforesaid, was then and there and for a long time theretofore had been an incompetent person to act as brakeman on a moving train and especially at night time, by reason of weak and defective eyesight and other physical infirmities and that prior to said collision defendant knew or ought to have known of his said incompetency and that defendant was negligent both in the employment and retention of said Childress in said service and that said negligence proximately contributed to cause said injury.

Plaintiff further says that defendant at the time and place of said collision, and prior thereto, had in force and operation for the government and guidance of its said employés operating said train, certain rules and regulations substantially to the effect that when one freight train followed another such train, it should not do so at a less distance of space in time than five minutes, and that freight trains on the division of defendant's railway where said collision occurred should not run at a greater rate of speed, and especially backwards, than eighteen miles per hour, and plaintiff says that defendant, its agents and employés while operating said colliding train, were then and there negligently violating said rules in each

of said particulars and that said negligence proximately caused and contributed to cause the collision and injury aforesaid. That in an effort to cure himself of said injuries plaintiff has heretofore expended and because liable to pay $250.00 for doctors and $150.00 for medicines and in the future in an effort to cure himself of said injuries it will be necessary for him to expend $500.00 for doctors and $250.00 for medicines and plaintiff says that such charges have been and will be customary and reasonable charges for the same.

That by reason of the premises aforesaid, plaintiff says that he has been damaged by defendant and defendant has become liable to pay him the full sum of fifty thousand dollars ($50,000.00).

Wherefore, plaintiff prays for citation upon this, his first amended original petition, for judgment for his said damages, for all costs of suit and for general relief, and thus he will ever pray, etc.

BEN M. TERRELL,
Att'y for Plaintiffs.

(The foregoing has the following indorsements, to-wit: No. 252. Geo. H. Dashiell, by next friend *vs.* The Texas & Pacific Ry. Co. Plaintiff's 1st amended original petition. Filed 20 day of Dec., 1902. J. H. Finks, clerk, by J. B. Finks, deputy.

Defendant's Second Amended Original Answer.

Filed March 24th, 1903.

In U. S. Circuit Court at Fort Worth, Texas.

G. H. DASHIELL
vs.
TEXAS & PACIFIC RY. CO.

Now comes the defendant, The Texas & Pacific Railway Company, and by leave of court files this its second amended original petition, in lieu of its first amended answer filed herein, and says:

1. It demurs to plaintiff's petition filed herein and says that the same is insufficient in law and shows no cause of action, and of this it prays the judgment of the court.

2. Answering said petition, if required, the defendant denies all and singular the allegations therein contained, and of this it puts itself upon the country.

3. For further and special answer, if required, this defendant says that plaintiff, G. H. Dashiell, cannot recover for the reason that the said Dashiell was himself guilty of negligence which directly and proximately caused and contributed to his injuries, and that but for such negligence on the part of the said Dashiell his said injuries would not have occurred that said negligence on the part of said Dashiell consisted as follows:

a. That said Dashiell while riding upon the freight train and in charge of same had full knowledge that another train was following his train. That he directed and knew, or should have known, that his train was to be brought to a stand still or for the speed of same to be slowed down in order that a person who was riding upon same might get off, or for some purpose and said train was slowed down or brought to a full stop. That said Dashiell negligently and carelessly failed to send any flagman back to warn the train following or to have any torpedo-s put upon the track or to give a signal or warning to the rear train or to use any precautions whatever to apprise the train following, that the speed upon which the said Dashiell was riding had been lessened or stopped entirely. That it was the duty of the said Dashiell under the circumstances to see that those in charge of the rear train should not approach too near to the train upon which he was riding, and to use all proper signals to that effect, to-wit: sending a flagman back, placing torpedo-s on the track, and giving slow signals and such other precautions as would be needed and necessary to apprise the rear train of the fact of its near approach to the train upon which the said Dashiell was riding. And that had said Dashiell used reasonable care in this respect said accident would not have occurred and that he was guilty of negligence therein which directly caused and contributed to the accident.

b. Said Dashiell was also guilty of negligence which contributed to the injuries of which he complains, in that after said accident he failed to have and use the proper medical treatment and failed to take proper care of himself, but on the contrary exposed himself and voluntarily and constantly drank whiskey and other stimulants to such an extent that the same aggravated, caused and produced the troubles of which he now complains, if any he has, and that such failure on his part to take proper care of himself and the use by him of intoxicating liquors and other stimulants aggravated, caused and produced the injuries of which he complains, or has, if any.

4. For further special answer this defendant says that if there were any negligent acts on the part of any of the agents and servants of this defendant, that the same were then and there the fellow servants of the said G. H. Dashiell and the defendant is not liable therefor.

5. And for further and special answer this defendant says that after the occurrance of the accident set forth in plaintiff's
7 petition, to-wit: on the 24th day of December, 1900, the said G. H. Dashiell and this defendant made and entered into a contract and agreement, and that in pursuance of same, to-wit: on the 2nd day of February, 1901, for and in consideration of the sum of $30.00, then and there paid to the said G. H. Dashiell, he, the said G. H. Dashiell, executed and delivered to this defendant a certain written contract and agreement and release, by the terms of which, for and in consideration of the amount then and there paid,

to-wit: $30,00, the said G. H. Dashiell did release the defendant The Texas & Pacific Railway Company in full, of all damaged resulting to him by reason of the accident aforesaid, and did bind himself to indemnify and forever hold harmless the said Texas & Pacific Railway Company, from and against all claims, demands and liabilities, of any and every kind and character whatsoever, for and on account of the injuries and damages sustained by him in the manner described and upon the occasion named and arising and growing therefrom, or such as might thereafter arise and accrue in any way therefrom. And it says that it was the full understanding by and between both parties that said release should operate as a release in full of all damages of any and every kind and character which had ensued or might ensue to the said Dashiell, and was a full settlement by and between the parties for all injuries happening to the said Dashiell on account of the accident named, and was fully understood and agreed to by the said Dashiell, which said release is hereto attached and made part of this answer.

6. And defendant further shows that the said G. H. Dashiell, after the execution of said release and receipt of said money did thereafter remain in the service and employ of this defendant for the period of about three months and did at said time and at all times thereafter ratify and approve said release and all of its terms and provisions. And defendants pleads said release and agreement in full of all claims and demands against this defendant and says that the plaintiff cannot now recover therefor.

STANLEY, SPOONTS & THOMPSON,
Attorneys for Defendant.

(The foregoing has the following indorsement, to-wit:) No. 252. G. H. Dashiell *vs.* T. & P. Ry. Co. Def't's second amended original answer. Filed 24 day of M'ch, 1903. J. H. Finks, clerk, by J. B. Finks, deputy.

8 Plaintiff's First Supplemental Petition.

Filed March 24th, 1903.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

GEO. H. DASHIELL, by His Next Friend, MRS. M. J. Dashiell,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 252.

Now comes plaintiff, Geo. H. Dashiell, by his mother and next friend, Mrs. M. J. Dashiell, and leave of the court being first had, files this his first supplemental petition, in answer to defendant's 1st

amended original answer filed herein on March 23rd, 1903, and for such supplemental petition says:

1st. That he specially demurs to the 3rd clause of said amended answer wherein defendant undertakes to plead a negligence on plaintiff's part contributing to his injuries, because said pretended plea simply sets out the conclusion of the pleader, is indefinite, wholly uncertain, vague and sets out no facts, nor does it undertake to set out any facts constituting, or even tending to indicate that plaintiff was guilty of any acts or conduct when and where said injury occurred in anywise causing or contributing to his alleged injuries.

Wherefore, plaintiff prays the court to strike out and hold for naught said pretended plea. And of this he prays judgment of the court.

BEN M. TERRILL,
Attorney for Plaintiff.

2nd. That he demurs specially to the 4th clause of defendant's said answer wherein it undertakes to plead that the injuries to plaintiff were the result of a risk of employment assumed by him, when and where said injury occurred, because said pretended plea sets out no facts tending to show that plaintiff and defendant's servants negligently causing said injury were in the class of fellow servants. Said plea does not pretend to allege, in traverse of the allegations of plaintiff's 1st amended original petition herein on file, that plaintiff and said injuring servants were not working together to a common purpose, in a common employment, and were not working at the same piece of work, &c.

Wherefore, plaintiff prays the court to strike out and hold for naught said pretended plea. And of this he prays the court's judgment.

BEN M. TERRELL,
Attorney for Plaintiff.

9 3rd. That he specially demurs to clauses 5 and 6 of said amended answer, that portion of said answer wherein it sets up a pretended release of damages by G. H. Dashiell, on to-wit: the 2nd day of February, 1901, in consideration of the sum of $30.00, and he says that the same together with the said pretended release thereto attached as an exhibit, show on their face no defense nor bar to plaintiff's cause of action in this:

1st. The pretended release shows on its face that plaintiff G. H. Dashiell, did not undertake, intend nor contract to release defendant from any injuries and damages, except the following, to-wit: "Bruising my body, right leg, right arm and a scalp wound."

2nd. It shows on its face further that the general words in the latter clause thereof, and specially set out and declared on by defendant in said plea (clauses 5 and 6) as a complete defense and bar to plaintiff's cause of action herein, are limited by the specific recital of injuries above stated and contained in the 1st clause of

said release; and for which said specific injuries only said $30.00 was to be a settlement and consideration.

3rd. It does not pretend to acquit and release defendant for damages and injuries to his skull, brain, head, mind, eyes and mental functions and nervous system, &c., as declared on and sued for in plaintiff's said 1st amended original petition; and that said particular recital of injuries in said 1st clause of said release qualified and limits the said general words of release in said latter clause thereof to the said particular injuries specified, and that said injuries to plaintiff's skull, brain, head, eyes and mental functions and nervous system said release shows on its face were not included in, nor intended to be included in, said contract of settlement. And of this plaintiff prays the judgment of the court, both in law and equity, &c.

BEN M. TERRELL,
Attorney for Plaintiff.

Plaintiff specially denies all and singular the allegations in said amended answer contained, says the same are untrue and demands strict proof thereof.

BEN M. TERRELL,
Attorney for Plaintiff.

Further answering comes the plaintiff, by his said next friend and says:

1st. That if the court holds against him on the foregoing demurrers, then he says if he, Geo. H. Dashiell, did sign the release, as pleaded by defendant in said 5th and 6th clauses of said answer, and that if he did continue in the service and employment of defendant after said release was signed by him, if he did sign it as alleged in clause 6 of said answer, yet that he signed and executed said release while *non compos mentis* and while his mind was weak, unsound and in an imbecile, diseased condition, and that while he was in the service of defendant, as alleged in said clause 6 of said answer, he was a *non compos mentis*, his mind was weak, unsound and was in an imbecile and diseased condition, and that he was not in his right mind during the whole of said time, and in fact has not been, from the time of his said injury. That he was suffering at said time and times intensely from his said physical and mental injuries, received as set out above and in his amended petition; and that his head, brain, mind and entire nervous and physical system were so hurt, afflicted, diseased and weakened as to be unsound at said time, and times, and he was thereby in mind and brain incapacitated to attend rationally to any business or to make and execute said release or any contract relative to his injuries and damages, or to ratify, approve or adopt said release contract or any other contract pertaining to his said injuries and damages.

That at the time defendant in said answer claims and alleges that

plaintiff executed and signed said release and also at the time it so claims that plaintiff ratified and adopted said release contract, and in fact during all the time from the date of said injury to the present day, plaintiff was and has been suffering physically and mentally from the injuries set out in his said 1st amended original petition, and that by reason thereof his mind was and is diseased, deranged and unsound and incapable of taking into consideration the results of his acts, and that he was not bound and ought not to be held bound by said release; nor does he, nor could he, from the causes aforesaid ratify, adopt and approve the same; and that said release was at the time of its execution, and ever since continuously from said time to the present time, has been wholly void. That at the time defendant alleges said release was executed and at the time it alleges that plaintiff ratified and adopted the same, plaintiff's mind was unsound, he was in a mental stupor, he was a mental imbecile and was in a state of mental irresponsibility, and from the causes aforesaid, and from a mental standpoint, he was incapable of grasping and knowing the importance and result of contracts made by him, and especially of said release contract, and that such has been his mental and physical condition from the causes aforesaid until the present time, and that all of these facts were at the time known to defendant, or could have been known to it by the exercise of ordinary care in the premises.

Plaintiff says that he has tendered back to defendant the said
11 sum of $30.00, together with more than six per cent. legal interest thereon, to-wit: the full sum of $34.00, and that he here now tenders unto this court the said sum of $34.00 for defendant, and asks that said release be cancelled, set aside and held for naught.

2nd. Answering further herein, by his said next friend, if so required, plaintiff further says that the alleges (alleged) release contract set out and referred to in clauses 5 and 6 of defendant's said amended answer shows on its face that plaintiff did not undertake nor contract nor intend to release and acquit defendant from any injuries and damages, if any, except the following, to-wit: bruising his body, right leg, right arm and a scalp wound; and it further shows on its face that the general words in the latter clause thereof and specially declared on by defendant in clauses 5 and 6 of said answer, are limited by and to the specific recital of injuries last above stated and contained in the 1st clause of said pretended release, and that only for said specific injuries, if any, was said $30.00 intended to be a settlement and consideration. That said release does not purport, nor thereby did plaintiff intend, to acquit and release defendant for injuries and damages to his skull, head, brain, mind, eyes, mental functions and nervous system, nor for expenditures on part of plaintiff for doctor's bills, medicines and other necessary expenses having accrued at time of said release, or thereafterwards to accrue to plaintiff as a result of the said injuries and causes, as alleged, relative to said injuries and expenditures in his

said 1st amended petition. And that said last named injuries and expenditures said pretended release shows on its face, and plaintiff alleges as a fact, were not intended by plaintiff and defendant, when said release was executed or thereafterwards, to be settled for, nor included in said release contract.

Plaintiff says that he has tendered back to defendant the principal and legal interest of said $30.00, and here now tenders into court the sum of $34.00 for defendant; and here asks that said pretended release be canceled, set aside and held for naught. And especially does he pray that the same be canceled, set aside and held for naught with respect to all injuries and damages enumerated in said 1st amended original petition, except those particularly specified, as aforesaid, in the 1st clause of said pretended release.

3rd. Answering further herein, by his said next friend, comes now the plaintiff and says that if he is in anywise or manner mistaken in his foregoing pleas, then he alleges that at the time
12 he is alleged to have signed the said pretended release—if he did sign it—and also at the time and times that defendant in said clause 6 of said amended answer alleges that he worked for defendant and ratified said pretended release, that both he and defendant and defendant's agents and servants, were mistaken as to the extent, nature and character of his said injuries, and that neither he nor defendant and defendant's said agents and servants who represented defendant in procuring said release and who also represented defendant while plaintiff is so alleged to have served defendant and to have ratified said release, took into consideration the real nature, extent and seriousness of plaintiff's said injuries, nor did they contemplate at said time that as a proximate result of said injuries that plaintiff's skull, head, brain, mind, nervous system and eyes were, or would be, afflicted, injured and damages (damaged) as hereinbefore and in his said 1st amended petition are set out and complained of. That the said seriousness of the said injuries to plaintiff were at said time and times hidden from and not known to said G. H. Dashiell and defendant, and its said agents and servants, and was not then known to them and was not taken into consideration or contemplation by them in the said matter of settlement, nor in the said matter of alleged ratification. That had plaintiff known of the said serious nature, extent and character of said injuries at said time and times he would not have signed said release, if he did sign it, nor would he have re-entered the employment of defendant and have by act or word, if any, done or said anything calculating to ratify or tending to ratify by him, as alleged by defendant, said execution of said release. That said pretended release was and is wholly wanting in consideration, and without consideration to plaintiff for the said serious injuries hereinbefore and in his said 1st amended petition alleged and complained of. That said release and said pretended ratification thereof, as alleged by defendant, did not, nor does not affect plaintiff's right to sue for his damages resulting to him from the aforesaid serious injuries.

Plaintiff here tenders back, as aforesaid, the said $30.00 plus the legal accrued interest thereon from date of the execution of said release, amounting in all to $34.00, and both in law and in equity pray- the court that said release be canceled, set aside and held for naught, &c.

M. J. DASHIELL.

4. Now comes plaintiff, by his said next friend, and further answering herein, if so required, says: That if said pretended release and said pretended ratification, as pleaded by defendant, as
13 aforesaid, should be held to contemplate the aforesaid serious and violent injuries to plaintiff instead of to contemplate only the aforesaid slight injuries stated specifically in the said first clause of said release, as aforesaid, then plaintiff says that the same is without consideration and wholly wanting in consideration, and also was at the time of its pretended execution and ratification without consideration and wholly wanting in consideration for that purpose.

M. J. DASHIELL.

I, Mary J. Dashiell, the mother and next friend, as aforesaid, of plaintiff, G. H. Dashiell, first being duly sworn, do solemnly swear that the facts set out in the foregoing plea (No. 4) of lack and want of consideration are true.

MARY J. DASHIELL.

Subscribed and sworn to before me, on this the 23rd day of March, 1903, by the said Mary J. Dashiell.

[SEAL.] A. A. HENDERSON,
Notary Public for Tarrant Co., Texas.

THE STATE OF TEXAS, }
County of Tarrant. }

Before me, the undersigned authority, on this day, personally appeared Mrs. Mary J. Dashiell, who, after being by me first duly sworn, deposes and says, on oath, that she is the mother and next friend of plaintiff, Geo H. Dashiell; she further deposes and says, on oath, that the matters and things alleged and set forth in paragraphs 1, 2 and 3 of the foregoing special pleas of plaintiff in this his 1st supplemental petition are true, both in substance and in fact.

[SEAL.] A. A. HENDERSON,
Notary Public, Tarrant Co., Texas.

Subscribed and sworn to before me, on this the 23rd day of March, 1903, by the said Mary J. Darshiell.

[SEAL.] A. A. HENDERSON,
Notary Public, Tarrant Co., Texas.

Wherefore, premises considered, plaintiff, by his said next friend, prays as heretofore prayed in his said 1st amended original petition for his said damages, costs, &c., and he also prays herein for general, special and equitable relief, and thus he will ever pray, &c.

BEN M. TERRELL,
Attorney for Plaintiff.

The foregoing has the following endorsement, to-wit:
No. 252. Geo. H. Dashiell, by his next friend, Mrs. M. J. Dashiell, *vs.* The Texas & Pacific Ry. Co. Plaintiff's first supplemental petition. Filed 24 day of M'ch 1903. J. H. Finks, clerk, by E. C. Van Dusen, deputy.

14 Defendant's Supplemental Answer.

Filed March 24th, 1903.

In the Circuit Court of the United States for the Northern District of Texas, at Forth Worth.

GEO. H. DASHIELL, by Next Friend,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 252.

Now comes defendant, Texas & Pacific Railway Company, and by leave of court files this its supplemental answer and says:

1st. That it demurs to the matters and things set forth in plaintiff's first supplemental petition for the reason that same sets out no valid or legal defense to the release heretofore plead by this defendant.

2nd. It specially excepts to the matters set forth in paragraph 2 of the answer contained in said supplemental petition, in which attempt is had to set forth what said release purports to contain, and not to contain, for the reason that said release is a written instrument and its contents appear upon its face.

3rd. It specially excepts to the matters and things set forth in paragraph 3 of said answer, in which it attempts to set forth and plead that the plaintiff and defendant were mistaken as to the nature and extent or the character of the injuries and that said injuries were then unknown to said plaintiff and defendant were not taken into consideration or contemplation, for the reason that same sets outs a defense at equity and cannot be plead or raised in an action at law.

4th. And for further answer it denies all and singular the allegations contained in said supplemental petition.

STANLEY, SPOONTS & THOMPSON,
Att'ys for Def't.

(The foregoing had the following endorsement, to-wit:) 252 G. H. Dashiell *vs.* T. & P. Ry. Co. Def't's supplemental answer. Filed 24 day of M'ch 1903. J. H. Finks, clerk, by J. B. Finks, deputy.

Original Release.

Filed March 28th, 1903.

Whereas on and prior to the 24th day of December, 1900
15 I, G. H. Dashiell, was employed by the Texas & Pacific Railway Co., as brakeman and extra freight conductor at or near Eastland, Texas, on the said 24th day of December, 1900, about 3:15 o'clock a. m. I sustained certain personal injuries in the manner and of the character described, to the best of my knowledge and ability, to-wit:

Extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm and giving me a scalp wound.

And, whereas, it is by said railway company and myself mutually desirable to maintain amicable and pleasant relations and avoid all controversy in respect to said matter.

Now, therefore, to that end, and in consideration of thirty and no/100 dollars, to me now here paid in cash by said Texas & Pacific Railway Company, I hereby release and acquit, and by these presents bind myself to indemnify and forever hold harmless said Texas & Pacific Railway Company, from and against all claims, demands, damages and liabilites, of any and every kind or character whatsoever, for or on account of the injuries and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing, or hereafter arising or accruing, in any way, therefrom.

It is expressly understood that, although we remain as free to contract with each other as if this transaction had not occurred, the Texas & Pacific Railway Company has not and does not agree to bind itself to employ me at or for any time, or in any capacity whatsoever.

And it is also expressly understood, that all promises and agreements respecting or in any wise relating to the subject hereof, are fully expressed herein and no others are made or exist.

Signed in duplicate, this 2nd day of Feb'y, 1901.

G. H. DASHIELL.

Witnesses:
J. A. HILLIS.
J. H. YOUNG.

(Indorsement:) Filed 28 of March, 1902. J. H. Finks, clerk, by J. B. Finks, deputy.

16 Judgment.

Entered March 28th, 1903.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Forth Worth, Texas.

March Term, A. D. 1903.

MARCH 28TH, 1903.

GEO. H. DASHIELL, by Next Friend,
vs.
TEXAS & PACIFIC RY. CO. } No. 252.

On March 24th, 1903, this cause was regularly called for trial and came the parties hereto, by their respective attorneys, and both parties announced ready for trial, thereupon came a jury of twelve good and lawful men who were duly selected, empanneled and sworn according to law to try this case and who after hearing the evidence, argument of counsel and charge of the court retired to consider of the verdict, and thereafter on this the 28th day of March, 1903, returned into open court the following verdict, to-wit:

"We the jury find for the plaintiff in the sum of seven thousand five hundred dollars ($7500).

J. S. WATSON, Foreman."

It is therefore ordered and adjudged by the court that the plaintiff, Geo. H. Dashiell, do have and recover of and from the defendant, The Texas & Pacific Railway Company, the sum of seven thousand five hundred ($7500.00) dollars and all costs of suit, for which let execution issue.

It is further ordered, that the officers of court do have and recover of and from the parties hereto respectively, the costs [by] them herein incurred, for which let execution issue.

The foregoing judgment bears the following marginal note: Bill of sale of one-half interest in this judgment to Ben. M. Terrell, Esq. Filed this the 12th day of April, 1903. J. H. Finks, clerk, by J. B. Finks, deputy. From Minute Book 2, page 316.

17 Defendant's Amended Motion for a New Trial.

Filed April 6th, 1903.

In the Circuit Court of the U. S. for the Northern District of Texas.

GEO. H. DASHIELL
vs.
TEXAS & PACIFIC RY. CO.

Now comes the defendant, The Texas & Pacific Railway Company, and files this its amended motion for a new trial and moves the court to set aside the verdict and judgment rendered herein and to grant a new trial for the following reasons:

1. It says that the court erred in the admission and rejection of testimony as will appear by bill of exceptions.

2. It says that the court erred in its charge in submitting the issues in reference to the speed of the train and the lookout to be observed and the space of time in which trains should run apart.

3. It says that the court erred in the construction of the release entered into by the plaintiff and in not instructing the jury that the same was binding upon the plaintiff.

4. The court erred in its charge to the jury wherein the jury are instructed that the burden of proving that the plaintiff was guilty of negligence rested upon the defendant and unless defendant had shown by a preponderance of evidence that the plaintiff was guilty of contributory negligence then the defendant would fail and the jury should find for the plaintiff.

5. The court erred in not instructing the jury to find for the defendant.

6. It says that the verdict of the jury was not sustained by the evidence for the reason that the evidence showed that the plaintiff was himself guilty of negligence which directly caused and contributed to the accident.

7. It says that the verdict of the jury was against the great preponderance of the evidence because the same showed that the plaintiff continued to work for several months after the accident without any complaint and at the time his mind was in sound condition and showed that he had obtained work at other places and the great preponderance of the evidence showed that him mind was not affected.

18 8. It says the verdict was contrary to the great preponderance of the evidence for the reason that the same showed that plaintiff was guilty of negligence in not giving the rear train proper warning when he caused the speed of his train to be lessened and that such negligence directly caused the accident.

9th. It says that the evidence as a whole showed that it was the duty of the plaintiff, when he caused the speed of his train to be

lessened, to have given the rear train proper signal or warning to that effect and that had he done this the accident would have been avoided and therefore the verdict of the jury should have been for the defendant.

10. It says that the verdict of the jury was excessive in amount because the evidence of defendant showed that plaintiff's injuries were minor in nature and also showed that plaintiff worked for months without complaining, that he has since stood two examinations on other railroads and obtained employment and the evidence of plaintiff was not satisfactory as to the nature and extent of his injuries and came almost entirely from the family and intimate associates of plaintiff and upon the whole was not sufficient to warrant this court in permitting a verdict of the extraordinary amount allowed by the jury.

Wherefore, it prays that the verdict be set aside and new trial granted.

STANLEY, SPOONTS & THOMPSON,
Att'ys for Defendant.

The foregoing has the following endorsement, to-wit: No. 252. Geo. H. Dashiell *vs.* Texas & Pacific Ry. Co. Def't's amended motion for a new trial. Filed 6 day of April, 1903. J. H. Finks, clerk, by J. B. Finks, deputy.

Order Overruling Motion for a New Trial and Granting Time in which to File Bill of Exceptions.

Entered April 11th, 1903.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, March Term, A. D. 1903.

APRIL 11TH, 1903.

GEO. H. DASHIELL
vs.
TEXAS & PACIFIC RY. CO. } No. 252.

19 On this day came on to be heard the defendant's amended motion for a new trial, and the court having heard and considered said motion is of the opinion that same is not well taken; it is therefore ordered that said motion be and the same is hereby overruled and that the defendant have sixty days from this date within which to prepare and file its bill of exceptions herein.

From Minute Book 2, page 352.

Bill of Exceptions.

Filed June 8th, 1903.

In the United States Circuit Court in and for the Northern District of Texas, at Fort Worth.

GEO. H. DASHIELL, by Next Friend,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 252.

Be it remembered, that upon the trial of the above styled and numbered cause, in the United States circuit court for the northern district of Texas, at Fort Worth, beginning on the 9th day of March, A. D. 1903, the following evidence was given, and counsel for plaintiff and defendant hereby agree to the following statement of facts.

1. The evidence shows that Geo. H. Dashiell, the plaintiff in this case, entered the service of the Texas & Pacific Railway Company, as a brakeman, on or about the 15 day of February, 1900. That he worked in such capacity until the — day of October, 1900, when he was promoted to the position of freight conductor. That as such freight conductor he ran on the line of the defendant company, between Fort Worth, and Baird, Texas, which latter point was west of Fort Worth.

2. It appeared that on the night of the 24th of December, 1900, at about 3:30 a. m., what is known as a rear end collision occurred, which was caused by a work train which had been following the freight train upon which Dashiell was riding, and of which he was conductor, running into the freight train upon which Dashiell was.

3. It appeared that Dashiell's train had left Baird and was running east toward Fort Worth. This train was delayed about five hours at Cisco. That they passed the work train at Delmar, where it had been working at or near Delmar clearing up a wreck.
20 That when the train left Cisco coming to Fort Worth, it came on east and passed the town of Eastland. That about a mile and a half east of Eastland the accident which will be hereinafter more fully described, occurred. It also appeared that after passing Eastland a short distance, there was a curve in the track and after passing the curve going east the track was straight for about a mile, from the end of the curve to the point of the accident. There was also a section house which was about ⅛ mile distant from Eastland, and about ⅛ mile from the point of the accident.

4. The crew upon Dashiell's train was Geo. H. Dashiell, conductor, Jas. Madison, engineer, J. L. Cheek and S. M. Berry, brakemen. This engine was headed regularly, that is, the engine in front of the train, headed east, and the train was composed of about twenty-five cars, mostly box cars with the caboose in the rear or west end of the

train. The work train which ran into this train and which had been out west of Eastland at a point near Delmar assisting in clearing up a wreck consisted of an engine and a caboose with four or five cars between the engine and the caboose. It appears that the engine was headed west and was on the west end of the train so that in moving it pushed the cars in front of it so that the caboose was on the east end.

Plaintiff's Testimony.

J. L. CHEEK, testified, that at the time of the trial he was a railroad conductor on the St. Louis & San Francisco railroad, and was a brother-in-law of plaintiff, Dashiell. That at the time of the accident he was one of the brakemen on Dashiell's train, and further testified as follows:

"We started from Baird, Texas, and were destined to Fort Worth, Texas. We passed the work train which ran into our train, at Delmar, and were laid out at Cisco for about five hours. We had orders to meet two west bound trains at Eastland, but they were on the sidetrack when we reached Eastland, so we never stopped there. Nearly all the way from Eastland to the next station was up hill. After we had passed Eastland and had just started up hill, but had not got to the hard pull, I was riding in the engine when I first discovered that there was anything wrong, and something drove us ahead. Both the engineer and myself looked at the air gauge, and thought possibly the train had broken in two, but the air was all right, and then pretty soon we started out and then broke in two about five cars from the engine. We looked right up at the air
21 gauge when the air hose broke. We were running at the time of the accident at the rate of about twelve miles an hour. At no time after passing Eastland prior to the accident was our train at a stand still. When I discovered the air hose broke I got off and ran back and found where it was broke in two and a draw-bar out. Myself and the engineer then went back to the rear end and found a smash-up, both of the cabooses and one of the cars being damaged. We could not find anything of our caboose but the floor. When I reached there they had gotten Dashiell out of the wreck and everything had caught fire from the stove. Dashiell was off away from the track lying on some cushions by a fire. He and Berry were both injured and were hollering and complaining a good deal about their injuries. Dashiell was bleeding, scratched up, his head hurt and coat torn to pieces and he could not stand up. He was carried on the engine from the place of the collision to Ranger, the next town east. I married his sister, and have known him quite a while, but have never been around him much. So far as I knew he was always before this injury, healthy, and full of ambition, and I always thought that he was a sensible, sound minded man. Since the accident I have been away most all the time, but have seen him two or three times, and have been with him some since the injury. He does not

seem like the same man. Before the accident he was lively and more ambitious in lots of ways. I can't explain it. Of course he is not able to go around and work which is one thing that probably affects him. He does not have the same get-up and ambition in the same way he used to before the accident. I have not seen anything that I know of that would indicate that he is a crazy man, or anything like that, but I think he acts a whole lot different from what he used to. I have not seen him since the accident, but what he was complaining of his head hurting him terribly. Soon after the date of the accident I went out of the State and returned in January following, and on my return saw Dashiell. His head was bandaged up and he was lying around home. Mr. Burke, the roadmaster, was on the train which ran into ours. Here is a "Y" at Cisco and with a little extra trouble they could have changed the engine and put it in front of the cars. They could have gotten the engine in front of the cars at most any of the stations, but could not have turned the engine around, except at Cisco. I saw Childress, who was front brakeman on the work train, after the accident, and he wore spectacles. He had been working with the work train before that, but I don't know whether he was familiar with the road or not.

22 Cross examination:

When we passed the work train at Delmar it was headed west—that is, the engine pointed to the west and the caboose was on the east end of the train. As we came on towards Fort Worth, I was riding on the engine and was satisfied the work train was following us. They could have put the engine in front of the cars at most any place where there are side tracks and switches, but that would leave the tender in front of the engine. They could have turned the engine around at Cisco. Work trains sometimes run backwards, as well as forwards, but they don't usually extend their limits to that time of night. They don't run them that way over half or two-thirds of a division, backing up. This work train was to stop at Red Bluff. When we left Cisco we ran at a rate of about eighteen miles an hour, and after passing Eastland to the time of the accident, but did not slow up any more than the upgrade that I know of. Didn't make any preceptible decrease in the speed from Eastland to place of accident, that I noticed. The engineer began working steam right after passing Eastland. If the air had been set, or the steam shut off, I undoubtedly would have noticed it. A section man, used to being around trains, would get off when the train was running twelve miles an hour. If we slowed up to let a section man off, I know nothing of it. Referring to the accident, the train made a lunge and then a jerk, and then it was that we broke in two, and when I went back the train had parted and there was a space of about a car and a half between the cars which had separated. Mr. Burke the roadmaster, was on the colliding train

and hurt in the collision. The rear brakeman is supposed to be on top of the train, or in the caboose. The conductor has charge of the brakeman and it is his duty to see that they are in their places and perform their duties properly. The conductor usually stays in the caboose. If a train, for any reason, should come to a stand still between the stations, it is the duty of the conductor to send a flagman back with a flag to protect his train from being run into; to stop any train that may be approaching. In running trains you always go on the idea that a train may be following. It would not be customary for a conductor, upon seeing a train following him, to have a man jump off and run back and flag the following train if he saw that it was getting in too close proximity to him; but if he slowed down and saw they were going to hit him they should get off; but it is as much the duty of the man following to look out for the train he is following, both are supposed to be on the lookout, to protect their trains. It is hard to tell how close you are to a train at
23 night. It may be that a "slow" signal could be given. I don't know anything about it. After Dashiell had his wounds dressed at Ranger, he came on to Fort Worth, arriving there about four o'clock in the afternoon and took a hack and went home. He now lives with his brother in Fort Worth, while I live in Springfield, Mo. I have been to the house since I have been here this time. He talks. I can't say that he talks rationally. He talks all right at times and at others he does not. He talks about the current events of the day. I was here about a month ago. I cannot see any difference in him now and then. Didn't see any difference in him then and when I saw him last spring—the spring of 1902. I think part of it is due to his not being able to work. He complained of his head pretty near all the time when he did work, after the accident. I think he went to work a short while after the accident and then laid off and then went to work a second time, and worked pretty regular up to the time he finally quit the T. & P. I would not consider him a drinking man. I never worked with him but that one trip.

(The counsel for the defendant then asked the witness what was the general reputation of Geo. Dashiell, as to being a man who drank, or got on sprees at time-; to which question the plaintiff objected, because incompetent, irrelevant, immaterial and because the question sought to elicit hearsay testimony; and the court sustained the objection, to which ruling of the court the defendant then and there in open court excepted.)

The witness further stated:

I don't suppose I ever saw him when he was under the influence of whiskey over two or three times. I never saw him drink, but I was not with him a great deal.

Re-direct examination:

The witness stated: that the first thing he noticed wrong with his train, after leaving Cisco, was when the train gave a sudden start forward and then a jerk and then broke in two, which was at time of collision; which made them think at first that the train had parted, but that he saw the air was all right and that the engineer never shut off at all, and pretty soon the train straightened out again, and then jumped again, and then we saw we were broke in two, and then I went back and found the draw-head pulled out. They kept up the same rate of speed from the time they left Eastland until the accident.

24 S. D. HAIRE, for the plaintiff, testified:

I am a locomotive engineer, and was in the employment of defendant railway company, as engineer, for about twenty years and remember the accident to the plaintiff near Eastland, on December 24th, 1900. At the time, I was engineer on a freight train going west. At Eastland I headed in on the house tract for this train that was going east to pass me. I had orders to meet this train there. I don't think I had orders for any other train, but there was a little short train following the east bound train. I don't remember whether it was running ahead or whether it was backing up. The train I had orders to meet came right through and, to the best of my recollection, it did not stop. When the train I was to meet passed I looked back to get a signal to go ahead, and it was no time until the short train following the other flipped right by me. Both trains were going at a reasonable rate of speed, at about 18 miles per hour, and they were no distance apart in space of time. I had just looked back for a signal to back up after this train passed me when the short train passed me. They could not have been running more than two or three minutes apart.

Cross-examination:

I don't remember whether I had orders to meet a work train or not. I do remember that I was surprised when the engine passed me so quick, right behind the other one and I took it for granted that they flagged in there against us, which railroad men often do; when they flag in they don't put a man on the head train for to hold the train that they have no orders against until they arrive at whatever point they want to make. I am almost sure that I had no orders to meet this short train. Work trains are liable to be out on the road anywhere. When a train is running between stations and comes to a stop it is the duty of the conductor to send out a man and flag, if they have time, or drop off a torpedo, or something of that kind. They should do it, but I have seen cases where they didn't do it. It is always the duty of the conductor to protect his train and see that the men do their duty. I think it is the duty of the conductor,

when he slows down his train, to warn the train following not to come too close to him. They should do it for safety. If he didn't have time to do it, it would be because the rear train is following him too close; a man would naturally suppose that the man on the front train was looking out to see that he didn't get too close to him. I have followed trains on the road all my life; it is very seldom I ever get a slow down signal. I have gotten slow signals from the rear end, but that is not often for I try to make it a rule never to get too close. A slow signal at night is a lamp, either white or red, swung this way—they won't swing violently—that means to stop; just a little side motion. The caboose carries lights on the rear, one on each side, and sometimes one in the middle. A man should know the track so well that he would know how far the lights were ahead of them. He should measure the distance by the curves and other objects. When he sees the train turn a curve he should know just how far that train is ahead of him. He ought to know from the curve where he is. I don't see how the last train could have come in without flagging, but I didn't see anything of a flagman, but I was looking back to get a signal. I would not have moved that train until I got a signal from the train men. He always comes to the engine first and says, "I am flagging against so and so," whatever it is, and then goes on down and tells the conductor.

Re-direct examination:

I mean by flagging in that the flagman would come to me and notify me. No one came to me that night. I don't think it is the custom of work trains to run in the night past stations where there is a "Y" and side-tracks with the engine to the rear of the train. Where there is an opportunity to turn the train or engine around, they usually do so. Whenever we have a chance to turn the engine and run ahead we always do it. I think both these trains, when they passed me at Eastland, were running at about the same rate of speed. I have pushed a train after night for a little ways, but not often; you are liable to run over some object in front of you. A work train on the road is sometimes tied up at places they can't get orders and they have to follow another train in.

W. M. PETRY, a witness for the plaintiff, testified by deposition, as follows:

I have known the plaintiff, George H. Dashiel, four or five years; I was brakeman on the rear, or work train at the time of the collision, and was in the caboose when it occurred. The first thing I observed with reference to the collision was the caboose turning over, and I went out through the cupola of the caboose and the first thing after that I saw the caboose in which Dashiel was riding on fire. Both cabooses were torn to pieces by the collision. The rear, or work train was backing about fifteen or twenty

miles an hour at time of collision. I don't know whether Dashiel's train was moving or standing still at the time of the collision. When I last saw Dashiel's train, about a mile before the accident, Dashiel's train was moving along in an easterly direction. It was about ten miles between Eastland and Cisco and was about 3½ miles from Cisco to Delmar. There were side tracks and switches at all three of these places, but no turntable at any place. Side tracks were used for side-tracking and turning trains to run in opposite directions; there were no Y's except at Cisco; I don't know whether the "Y" was in good condition or not; the switches operated in the ordinary way; each of the trains were equipped with appliances, apparatus and machinery, for the control and movement of said trains, which consisted of brakes and air, and were constructed and situated on said train in the usual place and manner they are used upon all trains. On the caboose of our train, which was the rear or work train, was William Childress, who was riding on the platform of the caboose which was on the east end, or nearest to Dashiel's train. It was the duty of said Childress to protect the rear train from being run into by another train and to prevent his train from running into another train and doing such other duties as brakemen generally perform; that the duties of the conductor are the same and it was the general duty in addition to the particular duty of each member of the train crew to protect the train from being injured and from injuring other trains; I have been railroading since 1890, and have had sufficient experience to make a reasonable estimate of the speed of trains. In cases where trains were backing up, as the rear train was, it was necessary to have a man stand upon the front end of the caboose, and his duties there would be especially to protect the train and its crew and other trains and their crews from injury.

At the time of the accident I was the regular rear brakeman on the work train, but William Childress was acting in my place as rear brakeman when the collision occurred. I do not know whether Childress done anything at the time of the accident or just prior thereto, and don't know whether any brake or angle-cock was operated by anyone or just before the collision. If any brake or angle-cock on the rear train had been turned or set, it would have checked the speed or stopped the train. William Childress wore glasses, but I know nothing more of his eyesight. Don't know whether Childress was familiar with the road or not; don't know whether he had ever acted as brakeman before over that part of the road.

27 After the collision I found Dashiel lying down and they carried him away from the wreck and laid him on a cushion on the ground. He was afterwards carried to Ranger, Texas. Mr. Dashiel said at first that his back was broken. At the time of the collision I was in our caboose warming. My duties at time of collision was that of rear end brakeman, but Childress was acting for me as rear brakeman while I was warming, and that is how he came to be on the hind end and also is how he came to be there acting for me.

E. J. PRING, a witness for the plaintiff, testified as follows, by deposition:

I am 64 years old; I am a physician and reside at Tucumcari, New Mexico; I am a graduate of the Royal College of London, England, and Medical College of San Francisco, California. Graduated in London in 1856 and San Francisco in 1876; I practiced medicine and surgery in England about seven years at Liverpool, and in Australia about the same time; came to the United States in 1870 and practiced in San Francisco about seven years, after which I was appointed to the United States Army as surgeon; left that service in 1890, since which time I have been practicing at Tucumcari. In my medical experience I have examined and treated a number of cases of insanity and diseased or deranged minds. On or about the 11th day of June, 1902, I formed the acquaintance of George H. Dashiel in my office at Tucumcari, New Mexico, where he had been for medical treatment. I treated him for mental aberration; treated him eight days for the purpose of subduing temporary insanity; I found his mind deranged, verging to insanity, because of a fracture *a fracture* of the skull received at some future time; I formed my opinion as to his condition after an examination as to his mental organism, and found his mind deranged to a considerable extent, which was on account of his skull having been fractured; his acts and general conversation showed his mind was unbalanced. Dashiel remained there in my or Mr. Aber's care during the time he was in Tucumcari, after which, to wit: on or about the 20th of June, 1902, he was taken away in care of his brother, and was suffering mentally, and unable to take care of himself.

Cross-examined:

I examined him at the instances of the officer who had him in charge. His actions were that of a lunatic; his statements were disconnected and flighty, and he couldn't tell where he came from or give any definite account of himself. I treated him daily for
28 nervous excitement. I understood from Dashiel that he had received a hurt or wound in his head by a railroad accident sometime before that. Dashiel was able to walk while I treated him; I did not find him suffering from or afflicted with any physical pain other than his head; his skull showed to have been fractured, which fact I ascertained and which conclusion I came to by digital and physical examinations.

D. J. ABER, a witness for the plaintiff, testified by deposition, as follows:

I was United States court commissioner at Tucumcari when I first met the plaintiff, George H. Dashiel, about June 11, 1902, at that place. I observed that he was sick and demented. I observed him about 9 days when his brother came and carried him back to Texas.

Doctor FIELDS, a witness for the plaintiff, being duly sworn, testified as follows:

My name is J. T. Fields; my residence is Ft. Worth; I have been practicing medicine and surgery for thirty-four or thirty-five years. I recollect something about having attended G. H. Dashiel sometime in the spring of 1901, at his home in Ft. Worth. I visited him about the 11th of May, I think; he complained of being very nervous and unable to sleep; my attention was called to an injury to his head; I think he had his hair clipped very close and he had some little scar on his head, and I felt of it; whether there was a depression there or not I don't remember distinctly; there was a little scar on his head at that time—a whitish looking scar; my attention was called specially by him and his friends and I am sure I examined for the depression. I prescribed for him; there might have been a slight depression; it was on one side of his head, I have forgotten which side; as to his mental condition, he seemed to answer questions correctly, but he seemed to be quite nervous; he had the appearance of a man that looked like—a little like he wandered a little, but I don't think I found it in his conversation. I gave him this prescription (shown to the witness) dated May 11, 1901; that is given to contract the small blood vessels; you give it in hemorrhage of the lungs and congestion of the brain; that was given to draw the blood away from the veins—to produce a weakening of the smaller blood vessels and quiet the nervous sypmtoms he seemed to have. This one is to produce sleep; and bromide is for the same purpose; iodine is used as an absorbant; I don't remember what I gave it for in this case; probably I had some idea that he needed some absorbent remedy. I don't know whether I gave it for head trouble or not; my treatment extended through several days
29 and weeks; I was not acquainted with the gentleman before he was hurt, but it didn't seem to me—especially from what his friends said about him, that he was in his normal mental condition; I don't remember that I have examined him since; when I was treating him he made complaint of his head hurting him; he complained a great deal, I think.

Cross-examined:

A person can have nervousness and sleeplessness and still have no brain trouble; that can be caused by mental worry and overwork. It can be caused from the stomach, indigestion and the blues; some people have a more nervous temperament than others.

He was then living on Jones street; I never knew him before that; I don't know how many visits I made him; I was not the company's physician at that time, I had been some time prior; I got acquainted with his family while treating him; I don't think I was acquainted with him before; it has been a good long time since I was surgeon for the company. I don't remember how often I visited him; I don't think I went every day. His wife told me he

got hurt on the railroad. I formed a good deal of my idea of him from what he and his friends told me; the scar was shown to me; he complained of his head, and that he couldn't sleep at night; I think he was able to sit up most of the time. I don't remember whether he come to my office or not, I am not sure. He talked rational; he described his symptoms, showed nervousness; he looked like he was not quite as well as he spoke; he knew me; he was perfectly rational, only a little nervous. If a man had been on a drunk for a week or ten days he would have practically the same symptoms—sleeplessness, headache, indigestion. This prescription I gave, I would prescribe that for a man who had been on a drunk—the bromide; the phenastine is usually given for fever. That is also given for headache. My prescription was given from his statement and from the statement of his friends—just what I got from them and the history; he didn't state that he had been on a drunk; didn't tell me he was a man accustomed to drinking. I think there was some slight depression on his head; well, I hardly diagnosed it as a fracture of the skull; might have been a little dent. The skull is formed about this part of the head of two hard plates with spongy matter between the two; a slight dent on the outer skull would not necessarily cause a dent on the inner skull. Somehow I didn't think much of the injury—just simply a nervous trouble; I found no paralysis; found no indication of the brain being injured. I can examine the plaintiff now. (Examines plaintiff.) I have forgotten which side it is; here is a scar here in the skin, but I am unable to find any depression; you can find a great deal more depression right here; this is fully an inch below the scar, if this is the scar right here, which I take to be the scar. (Patient points out the place.) At the place pointed out by the patient I cannot find any depression; I find no break of the skull; I find a place here where there is a depression; here is another depression right here, still below there; this is in the back part of the head; the other one is more distinct than where the scar is. These are such depressions as you will find in anyone's head—natural depressions. From a physical examination all I find is a scalp wound; I would not say that I could tell it if there was a fracture in the skull, but ordinarily you can. I have been practicing since 1869; I have done some surgery. I don't remember what I gave the iodine for. The constant use of whiskey may produce a diseased condition of the mind—impair the condition of the mind; if you should receive an injury sufficient to fracture the skull and produce a serious condition of the brain, you would ordinarily expect to find some objective symptoms, such as loss of locomotion, hemorrhage and unconsciousness for quite a while. The patient complained of hurting or pain in the head at a certain point; I would not think that the depression I found would cause that hurting; I would not think that a slight depression such as I found would cause that hurting to flow from that immediate spot in the head; if there is such a depression at that point as to cause a pressure on the brain at that

point, it could be relieved by a surgical operation, by tref-ining; it will then possibly assume its normal condition. A small depression might cause him to suffer as well as a large one. If a depression is on the brain from the skull pressing down on it, the most common symptom is the patient will have paralysis. I am now local surgeon for the Chicago and Rock Island railway.

Dr. W. C. MULLINS, a witness for the plaintiff, being duly sworn, testified as follows:

My name is W. C. Mullins; I am an oculist and aurist; I am a graduate of Bellevue hospital, New York city. I am a member of the firm of Frank and W. C. Mullins. Have been located here for five years; my brother has been here for fifteen or sixteen years; I was trained as an oculist and have been practicing in that profession since 1889.

I examined the plaintiff's eyes three separate times. I examined him the last time about a week or ten days ago; I first asked
31 him the questions to find out what he complained of; he of course told me about his injury; told me he couldn't see much out of his left eye. I then put him through the different tests—by putting a car- with letters of different sizes at different distances, and by also using the prismatic test. I let him answer the question. With his left eye he could only see the top letters, or large letters, at a given distance, and possibly the other poorly; with his right eye he could see practically normal. Sometimes people want to use oculist as a witness and I wanted to see if he was putting on, or what we call "malingering." I put him through all the tests known to the profession and when I got through I was satisfied he was not malingering, but really could not see out of that eye, as he said. I put him through these tests on three separate occasions; he didn't know that I was putting him through these tests; he couldn't know it unless he had been trained or I told him. I am satisfied he couldn't see out of that eye except to the extent I have stated. From my examination I would say that his sight in that eye is about from one-sixth to one-tenth; that may vary at different times, but it seemed to be about the same on those three occasions. I found no evidence of malingering, or putting on. His vision in his left eye is depreciated from five-sixths to nine-tenths.

Cross-examined:

From my examination I didn't detect any trouble at all in the organism of his eye—none as far as I could see. I couldn't detect any paralysis of the nerve; the only thing I found was loss of vision. A great many people have weakness in one eye and don't have it in the other, I could only tell the present condition of this man. The excessive use of alcohol would produce other symptoms; I have seen temporary blindness caused from excessive alcoholism. Anything that produces a high degree of nervousness will affect the vision.

He applied to me about two weeks ago for examination. I examined him three times during that week. He would have to be trained in that line or be mighty smart if he deceived me. He never applied to me for treatment; came to me to examine him as witness in this case. He would have to be mighty well trained to impose on me; I would not like to be fooled. You can tell total blindness, but partial blindness you have got to be particular. I cannot tell whether his condition is progressive or stationary. I cannot tell whether it is a case that would yield to treatment or not. From his statements and from my tests I will say that he is weak in one eye—in the left eye; that is the condition as far as I can state it. It is a fact
32 that sometimes a person may have a weak eye and go on for years and not detect it. I asked him when he had been injured and he said a couple of years ago. I think his mother came with him; Mr. Terrell, his attorney, had seen me in advance and arranged for the examination. Mr. Terrell was not present at the time. I think Mr. Terrell told me he had been injured. I didn't know anything about who he was. As a rule, I don't like to get mixed up in these damage cases, but you have got to do something for your friends sometimes. I have people come to me lots of times who have a weak eye, and don't know it until they are tested—one eye is weaker than the other, and they don't know it. I have seen a few practically blind in one eye and didn't know it.

An injury to the nerve seat might affect the function of the brain, and also affect the functions of sight. I have examined people that had no affection of the eye, who would come to me for examination. In testing his left eye as to whether defective or not I placed a 20 degree prism, the base out, over the left eye and directed him to look at a test card at 20 feet distance. The prism thus placed throws cross-angles of vision and there will apparently be two test cards. The one on the left is seen by the right eye and the one on the right by the left eye. I saw how Dashiell read with this test and compared same with my previous tests and satisfied myself that his left eye vision was depreciated, as above stated.

Dr. C. E. Frost, sworn for the plaintiff, testified as follows:

My name is C. E. Frost; I reside at Ranger, Texas, Eastland county. I have been living there 11 years. I am a physician and surgeon. I am a graduate of the Missouri medical college, St. Louis, Mo. I graduated in the spring of 1878 and have been continuously practicing medicine since that time. I have had considerable experience as a surgeon.

On or about December 24, 1903, I was called to attend the plaintiff, Dashiel; he was at the depot at Ranger Texas; it was in the night. He was laying on a bench in the depot; he was suffering from injuries to his head and in a shocked condition; he had a wound on the top of his head, or near the top and the left side of his head was bruised; the bruise on the side of his head I regarded as the worst injury; he complained of his head and his left eye; the wound on

top of his head seemed to have been made by being impinged between two hard substances; seemed like this side of his head the left side was bulged; seem like it had been pinched; there
33 was a depression there; my idea was at the time that it might be twenty years before the injury developed sufficient to produce pressure on the brain—any time between then and twenty years—in other words, that it might be progressive; he was in a shocked condition—in an exultant state of mind, apparently; he talked hilarious and seemed to be in a state of mental intoxication; I got him quiet and dressed the wounds as well as I could and sent him to the hospital at Fort Worth. I have seen Mr. Dashiel since I came here; I examined his skull and found a little depression on top of his head, at the point where the injury was; knowing the case as I do I do not consider him of sound mind.

The railroad company paid me for attending Mr. Dashiel when he was hurt. Mr. Dashiel's wound that I examined him for could have produced and probably did produce an osceous tumor or lymph formation to form somewhere in his head that would cause pressure to exist in the brain organism and produce pains in the head.

Cross examined:

I don't know that I have had a great deal of feeling in this case; I have not taken a great deal of interest in the case—no special interest. Ranger is a town of about 600 people. Mrs. Dashiel wrote me some letters, and I answered her letters; if I am considered a partis-*m* in a case I am in, I don't know it. I saw him once when I was at the depot; he was going out on his train; I don't think he was all right—that was after the accident; he had his train; I told him then he didn't have any more business running a train that I had.

When I first saw him at the depot after the accident, I think it was about dark; I dressed his wound, and I suppose it took me three-quarters of an hour or an hour. There was a slight depression there; I think the depression is the result of the wound. I didn't find any other wounds on his body that night, in fact he was in such a hilarious state that he would hardly submit to an examination of his body, said he was all right, just take care of his head, that was all he cared for, I examined his head and found no other depressions that I thought would cause trouble. The injury I found was on the left side of his head; at that time I didn't think that wound amounted to much; the whole side of his head was bruised and the blood oozing; looked like it had been caught and squeezed; there is no scar there now; I washed the blood off, of course I thought it was from the scalp wound until I got to dressing it and found the blood oozing from here side of his head
34 (indicating); it was bruised and discolored; yes, a minor blow will sometimes cause a discoloration; a man may go

out shooting, and the gun will cause a discoloration of the shoulder. His head seemed to be bulged; a man may bump his head and it will be bulged in ten or fifteen minutes. I saw him the next morning; he was able to walk—like a blind horse.

I was informed that he was in trouble—had been indicted; Mrs. Dashiel wrote me, I think she said he had been arrested; I hav-n't got the letters she wrote me. I did not form my opinion of the seriousness of the result from what I heard; if they had written me that he was all right I would have doubted it. He might have attended to business for a good while and one of these depressions gradually grow and press down on the brain, might not press so much as to cause trouble in twenty years. If that goes to the brain it will result seriously before or after twenty years; I have seen people with injuries to their head that never hurt them at all. I have seen people with worse looking injuries than this that didn't hurt them—didn't affect them, but the skull was not injured, it was only a scalp wound, not enough to press down on the brain. My conclusion was from what I saw of him, that he was seriously injured. That was my opinion. I always try to base my opinion on reason. I don't lay any particular claim to being an expert on brain trouble.

In these letters from his wife, it was stated that he had gotten into trouble, that he had been charged with taking things, and forging checks; the idea was that he was in trouble and want- assistance—wanted to show that he was not responsible; no, sir, that is not what I base my opinion on.

That depression was on a line just above his ear, straight up, near the top of his head. That depression was not there when or before he was injured. That depression was right in the wound; it was not there prior to the injury, it was made right then. That was the only depression I found.

(Plaintiff is examined by witness before the jury.)

I testified a while ago that I found no other depression; here is a sink, but that is not a depression—I thought you were talking about depressions made by the injury. There was a scalp wound right there at that depression. According to what you say I don't know whether I found any other depression or not, I don't think I am mistaken in saying that I found no other depressions, I thought you were talking about depressions made by wounds. I don't know whether other doctors have found depressions or not. I don't question any other man's motives. I am not acquainted with Doctor Fields; I know his reputation; he stands very high as a successful surgeon.

I saw Mr. Dashiel last Sunday; didn't engage in conversation with him, he didn't remember me; he didn't talk about the facts of this case; I only staid there about five minutes; I heard him talk to his mother and sister; from what I saw I didn't regard him in his right mind; no, I would not like to base an opinion as a professional man on five minutes' look; I went again the next day with

Dr. Harper; I staid long enough to look at the man, and said a few words to him; he knew Dr. Harper, but didn't know where he had met him; we wanted to look—to satisfy ourselves.

Doctor BORDERS, sworn for the plaintiff, testified as follows:

My name is J. M. Borders; I reside in Ft. Worth; have been living here thirteen years; I am a graduate of the university of Louisiana, now Tulane university, of New Orleans. I have been practicing medicine and surgery since 1869.

About the 24th of June, 1901, I was called to see George H. *Dashiel*, the plaintiff in this case; he was residing on South Calhoun street. My book shows the first visit to be the 24 of June and the last the 29th of July. There was a depression on the left side of his head, he had received an injury, so he stated, and suffered from symptoms of compression of the brain. I examined him and he was very nervous at the time and complained of considerable pain in the head, nervousness and inability to sleep, etc. I told him I thought a surgical operation would be necessary to relieve the pressure on the brain. I gave him medicine to act on the brain and quiet the nerves; under my treatment he got a little more quiet, and rested better. From my observation and treatment and examination of him I would say that his mental faculties seemed to be somewhat impaired; when I saw him he was restless and complained of pains in his head and seemed not much inclined to talk; it is frequently the case that in cases of compression where they remain in a restless condition they are not much inclined to talk; I had never seen him before the injury, and therefore could not tell whether any change in his facial expression or not, except his eyes were rather peculiar, as well as I remember one of his eyes—one pupil was slightly dilated and the other contracted. I made a charge of two dollars per visit, which was reasonable, usual and customary; and my doctor's bill against him is twelve dollars.

36 There is an association or relationship between the mental and moral faculties; we often see that a derangement of the mental faculties interferes with the moral faculties.

The first time I called to see Mr. Dashiel I think his wife telephoned to me; he was then living with his wife on South Calhoun street. He told me he was injured—had been in a collision. When I told him that a surgical operation would relieve him he didn't *he didn't* say anything; I rather insisted that that would be the speediest way and perhaps the only, to give him relief; that is an operation frequently performed; that is called trefining, or trepanning. If he was in any trouble of a criminal nature at that time I don't know it. It is true that the brain is protected by an inner and outer skull; the space between the two is very slight; sometimes a dent in the outer table does not produce any on the inner table or brain table. As a rule a blow sufficient to fracture the inner table will produce temporary insensibility. Doctors frequently make mistakes in diagnosing cases.

Re-direct examination:

An injury to the skull sufficient to produce pressure on the brain, if not relieved, would grow worse instead of better. If it was worse then than now, it might be possible that there was not so much pressure there. There might have been a rupture of a small blood vessel. My diagnosis of the case to the effect that there was pressure on the brain was caused by the symptoms he manifested and told me. The first thing a doctor would think about, seeing an indentation in the skull, he would naturally look for symptoms of pressure on the brain. He complained of standing pain in his head, and inability to sleep; I don't know whether that was true or not, I couldn't feel the pain, of course. He was restless and irritable. I find people in this condition, certainly, that have no brain pressure. Yes, it is true I find people with headache without any brain pressure. I could hardly say that every symptom he had could be accounted for on some other basis, with that indentation in his skull and the history of the case showing that he had received an injury; of course I had to take what he said. Yes, the excessive use of alcohol is likely to produce irritability, sleeplessness and headache. It will cause loss of vision, produce paralysis of the moral nature. I did not know when I examined the plaintiff that he was addicted to the use of alcohol. In giving me the history of the case he never mentioned that, neither did his wife or any one else. I did not know that he had been on protracted sprees before that. I
37 don't know that it would have made any difference if I had known it; of course I might have made some allowance, but I would have attributed it to the depression.

The ordinary result of pressure on the brain, in acute cases, there is a loss of sensation, paralysis, though not always, but that is liable to occur. That is what is ordinarily expected from a depression on the brain.

I don't know how come me to cease treating the plaintiff; he moved from Calhoun street, out on Missouri avenue, on the extreme South Side, and I instructed his wife if she needed me to call me over the 'phone and I never heard any more from him until a few weeks ago.

W. A. REDFORD, sworn for the plaintiff, testified as follows:

My name is W. A. Redford; I live in Ft. Worth; have resided here twelve years; I am collector for Fakes & Co.

I remember the circumstances of Geo. H. Dashiel being injured in a railroad wreck; I knew him before that time, here in Ft. Worth; he was a member of our church—South Side Baptist church; I had known him about six months prior to that; I met him frequently and talked to him about church matters, discussed this things, how we were getting along spiritually, and so on. I should judge that he was a strong man, mentally before this injury, as much so as any man I know. I don't know just how long it was after he

was injured before I met him; when I met him he was telling me all about the injury; it was before he went back to work. It was at Whittsitt's drug store, on the South Side; I talked with him about ten minutes; I was very much impressed with his appearance, his mind seemed to wander, and he didn't have the same look that he had before; his conversation seemed to be very much disconnected; he was talking about his hurt, I didn't know anything about it until he told me. His mind seemed to be confused; he didn't talk like his mind was very clear. I passed him on the street time after time since then; of course I cannot help noticing a decided difference in the man since he was hurt.

Cross examined:

I was acquainted with him about six months before he was injured. I met him in the church when he first come here; I had conversations with him in regard to church matters, just like we brethren do. He said that he had gone wrong—had fallen away—
that he had been drinking; I don't remember that he told
38 me that personally, he told me I think that he wanted to be
restored; drinking had been his trouble; he told me that evil had overtaken him. That was prior to the time he re-united with the Baptist church. I don't remember how long it was after the accident until I met him; don't remember whether he had any scar, or bandage on his head or not; there were no bruises on his face; he hadn't gone back to work; the next time I saw him he was going towards the drug store and I overtook him; that must have been a couple or three months afterwards; he seemed to be in about the same condition he was before when I met him, if anything worse. When I first met him he told me about getting hurt and I thought he had got well and gone back to work and I was surprised to see him in that condition; I told him I thought he had gone back to work, and he told me all about it again. Said he hadn't been able to; I don't remember whether he told me he had been at work for a while or not. I saw him after that under the influence of whiskey; I don't remember but one time; it was down on 15th street, by Oscar Galloway's saloon; he had quit going to church; I don't think he has been to church since, and I have not been thrown with him; I went to his house once, about a year ago. I think it was before he went away to New Mexico; he was sitting in the house; yes he recognized me; he didn't impress me exactly as a crazy man; he seemed to understand everything, and know everything that was going on.

Dr. R. D. TALBOT, sworn for the plaintiff, testified as follows:

My name is R. D. Talbot; I am a practicing physician and surgeon. I am a graduate of Memphis medical college of 1884; have been practicing medicine about 17 years; I took a post graduate course at Chicago; I have had occasisn lately to examine George H.

Dashiel, the plaintiff in this case. I made two examinations; I think one on March 12th and one on March 13th, I believe. I examined him in regard to his mental condition. From my examination of him, I do not think he is in his own mind; I think he is suffering from a condition of insanity; I base that opinion on the objective symptoms and his history; his general appearance, his actions and the history of the case. I examined his head for a depression; I found a small scar on the left side of the head; there was a slight depression; in my opinion he is not mentally responsible for his acts. I cannot say whether his condition is permanent or not; it would be pretty hard to say whether by treating he could be brought back to his normal condition, I would not like to
39 express an opinion in regard to that; I don't think he is in a condition to perform physical or mental labor.

Cross examined:

I only saw him on two occasions; that was at his residence. I went to see him at Mr. Terrell's request; Mr. Terrell is Mr. Dashiell's attorney; I did not go to see him for the purpose of treating him; but to become a witness; nobody was there representing the other side of the case; Terrell was the only lawyer there; I formed my opinion from the history of the case; I took what he told me to be true; they gave me the history of the case—about the accident, and how he suffered, and various acts he done and performed; I accepted them as true; I talked some to Mr. Dashiel; he seemed to be fairly rational; I think he could make an intelligent statement; there is a slight depression there; I could not tell whether there was a fracture there or not, I don't think any physician could without making a surgical operation—an incision; if there is a pressure of the inner table on the brain, it might be relieved by a surgical operation; that is a common operation; a great many surgeons make a practice of it. He didn't ask me to do that. Independent of the history of the case, and exclusive of the statements of himself and friends, I would not have been able to form an opinion as to the condition of his mind, only by his face, he has a heavy, dull look, and then, of course, that has been connected with the history. It was my understanding that he had been a heavy drinker at times, since the accident; they said he was a sober man before the accident; and that he was a man of good, moral habits, and since the accident he had become a moral pervert, that he would drink and do erratic things, wander away from home, sign checks on banks where he had no money, and all such things; that was a part of his history; would get on protracted sprees; from that kind of a history it would not take a doctor long to form that opinion. If he received an injury two years ago, sufficient to produce this state of things, it would have had to be a severe injury; I have not made a special study of the brain—of surgery of the brain, but I understand if injury occurred to the foundation or motive center of the brain it

would produce paralysis. If it was a severe injury, an acute injury to the brain, you would expect some objective symptoms, such as unconsciousness for quite awhile, and loss of sensation and a dazed condition. I give my opinion of his condition from the history of the case as they give it to me, and the objective symptoms, as I see his features; he looks stupid and dull; it is a fact that a man could assume that. Mr. Terrell gave me the history of the case, and the man himself; Mr. Dashiel gave me an intelligent statement; he didn't tell me what he had been doing since. He didn't tell me about drinking; Mr. Terrell told me about that; Mr. Terrell practically laid the whole case before me.

Re-direct examination:

It is possible, that by a gradual pressure on the brain, to produce degeneration of the nerve cells or brain cells. My best judgment would be that it would have to be produced by a certain amount of pressure from the inner table—to produce that effect.

Dr. C. O. HARPER, sworn for the plaintiff, testified as follows:

My name is C. O. Harper; I am a partner of Dr. Talbot; I am a graduate of Tulane university, of New Orleans. I have been practicing medicine six years. I am assistant instructor in physiology and demonstrator of anatomy in the Fort Worth medical college.

I have had occasion to examine G. H. Dashiel, the plaintiff in this case, with reference to injuries and his mental condition. I made an examination on the 13th of this month, and then again yesterday or day before yesterday. My examination consisted of interrogation and an examination of his head; I made measurements of his head in order to determine the location of the injury; on the skull I found what we call an external depression—that is a depression of the external surface of the craninum; the craninum is the bone; one about here (indicating) and another about here, and I believe another here, which was of minor importance. There is no scar or mark; the mental function of the brain has no special location. I had a history of the case—just what they told me—his relatives. They give us a history of the collision and of him since the collision; Doctor Frost give us the history of his examination and treatment of him just after the accident; from my examination and the history of the case, I should say that he had mental aberration, or what is called mild dementia. In my opinion that would render him incapacitated for the transaction of business matters. I base that opinion on the history of the case and the objective symptoms; this condition may be produced by pressure on the brain; an injury to the brain will produce headache. I also took into consideration his physical appearance; he has a heavy expression, I would call it a dull, heavy expression of the face. Extreme nervousness and inability to sleep are symptoms of mental disturbance.

41 Cross examination:

I went to see him first on the 13th of March, at the request of the family; Doctor Talbot went with me; he is my partner; I think he had been once before. Mr. Terrell was not present; his mother give me the history of the case; she was with him; Doctor Talbot told me they had given him the history of the case before; he recounted that to me. I didn't go down again until day before yesterday or day before that. The last time I was there forty or fifty minutes; Doctor Frost was with me; the first time I was there about an hour; I talked to him a great deal; he answered intelligently, but slow; he give history of it, what he knew, but there seemed to be so much of it he couldn't remember—didn't know anything about; he gave us a history of how he had been suffering, and the things he had been doing; he skipped a great many things, and I got them from his mother; he would tell one thing and then another. I did not treat him. They asked me about an operation; I told them I couldn't promise them anything; if there was an internal depression of course an operation might do good if done soon; however, after this long time it is rather too much to promise. I am not certain from what I gathered from the history of the case as to how long he had been suffering with this mild form of dementia; there had been a fracture of the external table, I know, from the depression; the other wound I considered simply a superficial one; I found no other depression; there has been a fracture there, you can see it below the level of the general surface, in the cranium. The doctor that treated him told me that was the most serious one there. His history was that that was the worst one—the deepest; I think he considered that the most vital. There is still an inner table below that; I suppose that depression is one-tenth or one-twelfth of an inch, possibly less; that is the only one I found on his head; I don't think that was caused by a scalp wound, that would not cause that kind of a depression. I made the examination for the purpose of giving an opinion in the case; I knew there was a lawsuit pending; I have based my opinion in part on what interested friends told me; I never talked to Mr. Terrell about it—never asked him about it; he told me some of the history of the case. The plaintiff told me some of the history of the case; he would tell part of it and then go back—he would wander in his statements; I assumed that he was not trying to mislead me; if he had wanted to lead me he could have done so with reference to rambling. I questioned him about who he knew and whether or not he had seen me before
42 and about who I was and questions of that nature; he couldn't recollect anything, it seemed—any particulars; I tried to tangle him; I didn't think he was feigning; that was since the case was set for trial and right on the eve of the trial; I suppose it would be an easy matter if a man wanted to assume that attitude; we have some history of Peter not knowing of a man on a certain occasion, and he was not considered insane.

(The doctor examines Dashiell's head before the jury.)

There is one injury right there in the temple; you can feel that depression on his head; I consider that a superficial one; there is no other depression there that I can find; there is a normal one there; that is in every man. I didn't speak of that because that is normal; the other one back there is deeper; I didn't find that, I knew it was there in every man and didn't look for it. I don't know about finding depressions sometimes on men who have not been in accidents; I have known of such things. There is no objective symptoms indicating any pressure on the brain. If you get an injury sufficient to cause a fracture of the skull, or have a disturbance of the brain, it ordinarily produces a headache; sometimes vomiting and sometimes loss of sensation and loss of motion. His people never said anything to me about being a heavy drinker; they told me he had been a sober man up to the time of the injury. I think Doctor Talbot told me of his drinking since the accident.

There is an intimate connection between the intellectual and moral faculties, and if the intellectual faculties become deranged and abnormal the *normal* faculties are also liable to become disordered.

J. B. ALDRICH, sworn for the plaintiff, testified as follows:

My name is J. B. Aldrich; have been living in Ft. Worth for about two years; I did not know Mr. Dashiel before he was injured; I worked a month with him after the accident, on the Rock Island, I think it was in August, 1901; we were braking—in the train service; I worked a month, he worked longer than that; he used to complain a great deal of his head; when he would work and get warm, he would complain a great deal of his head; every time he would get a chance he would sit down and hold his head; ask him what was the matter and he would say he had an awful headache; he had a kind of wild look out of his eye, I noticed him on that account a good deal.

43 Cross examined:

He complained most all the time of having the headache; he was braking on a freight train—local freight from Ft. Worth to Chickasha; I think he come there a few days after I did; it is a fact that braking on a local freight is the heaviest work on the road; it is the heaviest for all train men, and the work was pretty heavy about that time. I never saw him drinking.

H. T. SHAHAN, sworn for the plaintiff, testified as follows:

My name is H. T. Shahan; I am in the grocery business with Mr. Sears; I remember the circumstances of Mr. Dashiel being injured while working for the railroad; I used to go to his house to deliver groceries when he was injured; I went there once or twice a day; I saw him while he was at home before he went to work,

after the injury; I spoke to him at different times; I remember asking him a time or two if there was anything he wanted from the store and he would speak about something else; I would speak to him on one subject and he would speak about something else; he was at home at the time; he was not in bed; I don't know how often that occurred, I remember two or three times perhaps. He didn't seem to care much whether he talked to me or not; I don't remember that I noticed his features particularly; he had his face bound up a good deal.

Cross examined:

This was just after he was hurt, I don't remember how long; I don't remember how long I delivered groceries to his house after he was hurt, it was a month perhaps; I can't say whether I was still delivering groceries when he went back to work on the road or not; I delivered him groceries as long as he lived where he was then living; he moved from there and he was out of my territory. I don't know how long that was. I knew him before he was hurt; he came here early in the spring I think and I went to take him groceries. Sometimes his wife would give the orders and sometimes he would give them; he was out on the road a good deal of the time.

J. P. NAYLOR, sworn for the plaintiff, testified as folllows:

My name is J. P. Naylor; I am a farmer; I live out at Arlington; I knew George H. Dashiel prior to the time he was injured; I have known him since about April, 1900; we were working together on the same crew, between here and Baird; I worked with him three months, and I never knew him to take a drink before he was hurt; I have known him to have an opportunity; I have seen it offered to him and he always refused it; I remember the time he got hurt; I saw him about the second or third day after he was hurt; I think it was the 26th of December; I saw him probably once between that time and the time he went to work. At times he would talk just as he always did, and at times he would get off, apparently. He was at home on these occasions; he had his head bandaged; he complained of his head hurting him all the time. I have noticed quite a difference in him in the last two years; he does not look right out of his eyes; he has not an intelligent appearance; he looked bright and intelligent before the accident; he commenced as a brakeman and was promoted to conductor before the injury.

44

Cross examined:

I knew him when he first went to work as a brakeman; I am an acquaintance of his; I don't know of any particular friendship existing between us; I have not seen him more than three or four times in the last two years. I saw him twice during the time he was hurt; I don't know how long he laid off after the accident; I

think somewhere in the neighborhood of thirty days, or sixty days. I think I went to see him twice. He was in the house both times; I think he was in bed both times; the second time I believe he was sitting up with his head bandaged. I never saw him downtown; when he went to work he went to running a work train at Red Bluff; I would see him in passing there, and would give him the paper; would not have any conversation with him, would merely hand him the Dallas News. I went down to see him last Friday; I had no particular purpose in going to see him; yes, I knew I was going to be a witness; I believe I spoke a few words to him; am a friend of the family; he talked just about like I spoke of awhile ago—that was in a curious way; nothing said about my being a witness at that time; I didn't tell them that I was a witness; I suppose they knew that, they had me subpœnæd; I had not seen him for several months prior to that time; Mr. Lane came while I was there; Mr. Lane is his brother-in-law; I am not related to any of them; Mr. Lane and I worked together about 18 months; prior to the time he was injured he was lively and as intelligent a man as I ever knew in the railroad service; he has a strange, curious look now; does not look right out of his eyes; looks dull; I am not able to say whether that can be feigned or not; I was hurt on the road; I didn't look lively and cheerful when I settled with the company, for I didn't get enough money, I settled too cheap.

HENRY S. LANE, sworn for the plaintiff, testified as follows:

My name is Henry S. Lane; I live in Ft. Worth; I am brakeman on the Rock Island; I am a brother-in-law to Mr. Dashiel; I married his sister. I was acquainted with Mr. Dashiel before he was injured; I have known him since the latter part of November, 1885; I saw him immediately after he got hurt, at his house; saw him before he went to work; up to the time he got hurt, his habits were good, as regards drinking and sobriety. I have seen whiskey offered him, at Baird, and he refused it, that was in the spring of 1900; from some time in March to July, or August, we were working together on the same train. I have observed Mr. Dashiel since he was injured—have had conversations with him; I have been conversing with him more or less ever since he was hurt; part of the time, and for the last six months I have been with him every few days; in fact he is at my house a good part of the time; his conversations are quite different now from what they were before the injury; I can see a big difference in the man; I have been here since 1885 and have been with him more or less since then and was with him quite a good deal before the accident and have been with him since; I notice a difference in his expression and conversation, and also notice a difference in his health and in his weight; he has diminished in weight and color; he was above the average for intelligence; I saw him just after he was injured; I lived within half a block of him; he was receiving when injured, three cents per mile, as conductor; it was about $125 or $130, and probably $140

per month. He has ever since his injury complained a great deal of his head hurting and sleeplessness.

Cross examined:

His salary was fixed at so much a mile, and his monthly earnings depended on how many miles he run; yes, it will average $125 to $130 per month the year around; a brakeman will average about $75.00, if he runs regular. I was conductor at that time; I was active in getting him a place; he didn't work extra, he got a regular job right at the start. I saw him the next day after the accident; he was sitting up; he was up and down for, I presume,
46 two or three weeks before he went to work; I don't remember the length of time he was off; in the neighborhood of thirty days; he made a trip or two and was off probably thirty days; when he went to work for the Texas & Pacific I never knew him to drink much; never saw him get drunk; in the fifteen or seventeen years I have known him I may have seen him take a dozen drinks. I never saw him under the influence of it. He and his wife separated while they were living here in Ft. Worth; the first time they separated they were living in Denison; it must have been in 1896 or 1897; when he came here and went to work for the Texas — Pacific they were re-married; he went out West and stayed a month or two, I don't know how long; I quit the service of the T. & P. about a year ago; I was discharged on account of a head-end collision.

Re-direct examination:

I knew the condition of Mr. Dashiel's eyes prior to the time of his accident; his eyes were good, I suppose; he passed a physical examination and was never turned down; I never before his injury heard of any complaint of his eyes. If a man's eyes are defective it will keep him out of the railroad service.

Re-cross examination:

There are instances where a man may work for a railroad and have defective eyes and not know it, and upon examination have to be let out; I don't think the Texas & Pacific has a system of examination; I think the Rock Island has a system of examination; I suppose he passed there all right, he worked for them awhile.

C. W. DASHIEL, sworn for the plaintiff, testified as follows:

My name is C. W. Dashiel; I live in Ft. Worth; have been living here a year last June; I came from Illinois; I am a conductor on the Rock Island railroad; I am a freight conductor, and run from Ft. Worth to Chickasha; prior to the time I came here I had not seen my brother and been with him for four years, I should judge. Up to that time, my brother was sober, as far as I know; occasion-

ally I have seen him take a glass of beer, but not often; he was considered a bright, good railroad man; he was one of the best we had on the Big Four; he was brakeman and conductor; we used to brake together when we were boys; last year I made a trip to Tucumcari, New Mexico [Mexico], for the purpose of bringing
47 my brother home; I found him there and brought him back to Ft. Worth, I think the 23rd of last June; since that time he has been living at my house; myself and my wife and my mother have been taking care of him. I had seen him here in Ft. Worth since I came South; I believe it was in April he went out to Tucumcari, New Mexico, to go to work; he went out to Alamagorda; I have seen him since he got injured and before he went to New Mexico. He is nothing like the same man he used to be; he don't have the ambition that he used to have, and he don't have the bright, intelligent look that he used to have; I have been with him often since I brought him back from New Mexico. He don't have the same expression that he used to have; he has a dull expression, and he is not as stout as he used to be—not as fleshy; we can hear him up at night quite often; he can't sleep; he complains of his head every day; his wife was here when I brought him back and lived with him—lived with us; I was taking care of her—the whole family. She left him—went back to Illinois; his eyes must have been all right when I knew him before he was injured; he passed examinations on the railroad for that purpose, and I never heard any complaint of it; I have never seen him drink any since he come back from Tucumcari, New Mexico.

Cross examined:

I came down here in June, 1901; he was supposed to have been injured in December prior to that time; Mr. Dashiel was living on Calhoun street when I came down here; he was not engaged in any business whatever; he was at home in bed most of the time—up and down. I don't know whether he had been working for the Texas & Pacific a short time prior to that or not; he told me he had been working for the Texas & Pacific; I don't know when he went to work for the Rock Island after I got here, it was in the fall; I believe it was in August or September; I think he run on the Rock Island something like two months, some time up towards Christmas when he quit; he went out to Alamagorda; I don't remember that he done anything that winter, after he quit the Rock Island he didn't try to do anything, stayed around the house most of the time; he went out to New Mexico to look for a job; he talked with me before he left; I don't know that he had a job promised him when he went out there. He didn't say whether he had or not; just said he was going to look for a job; he went from here to El Paso; I heard from him after he went out there, said he was braking for the El Paso & Northeastern; I don't think we got over two letters
48 from him; they were not addressed to me, they were addressed to his wife; she got one or two letters I know; when

I got up there I found he had been sick, or out of order. He was sick; I don't know anything about his having been on a protracted spree; I didn't make any inquiry as to that; he didn't tell me he had been drinking very heavily; I didn't know he had been drinking to excess; I didn't know anything about his drinking a good deal around Ft. Worth; he might, I didn't know anything about it. He didn't keep whiskey at home that I know of. When he come back he stayed at my house from that time on; when I am away my wife and my mother are there with him; he has been around the grocery store some—once with me that I know of. He stays at home and reads; he reads the daily papers, and there is generally a magazine or something around the house; he talks rationally on a good many subjects; he has talked to me about the history of the injury in the wreck, in an intelligent, plain way; he has never given me a history of his trip to New Mexico; he told me about working there. He does not do much talking around the house when I am there. When he was first married he lived at Mattoon, Illinois; I believe he was living in Denison when they separated the first time; I knew his wife before they were married; I don't know why they separated the first time. He never told me.

Mrs. M. J. DASHIEL, sworn for the plaintiff, testified as follows:

My name is M. J. Dashiel; I am a widow; I live in Ft. Worth; I brought this suit for my son; I have been in Ft. Worth four years; I come from Kansas City to this place; during the four years I have been living here, my son George has been living here part of the time—most of the time. Before the injury I think he was above the average for intelligence, but that is a mother, you know; I was at his house when they brought him home after the injury; he was brought home in a hack; his head was bound up with bandages; he went to bed; I can't tell how long he was confined to his bed, or room; I should say two weeks; I know it was a good many days he was unable to get out; when he went to work I was opposed to it, I thought he was not right mentally. I begged him not to go to work; I told him not to go to work; his wife insisted that he must go to work; I knew from the way he talked and acted he was not all right; he didn't seem to have any control over his mind; he didn't seem to understand anything, like he was in a dazed condition the
49 biggest part of the time; I noticed a difference in his appearance; he had a dull expression in his eyes; he complained of injury to several places on his body, but complained of his head most—continual pain and dizziness; even when he would try to walk across the floor he would fall down; his head would be so dizzy he would fall down; that was before he tried to work; I don't remember how long he remained there before he tried to work; he made one trip and then laid off thirty days, I think; when he came back home after making that one trip he was sick; he complained of his head and back, and I believe the burns on his limbs

were not entirely healed; he said that his head hurt him most; I never heard any complaint of his eyes before he was injured; his eyesight was considered good; I think he went to work for the Texas & Pacific in February before the accident in December; he lived with me; I never observed that he was drinking any during that time; I have never seen him what you call drunk; I have seen him drink a glass of beer; I have not observed him drinking any since he was injured; I know he has not drank any since. He has not drank any that I know of; the reason I know he never drank before he was injured I would see him every time he come in, and he would go with me to church every time he could; he was a member of the church. He wanted to work all the time; I never knew him to be laid off; since this injury he has not been able to work; when he was brought back from New Mexico his wife was here; I understand she went back to Illinois, she left here; she separated from him.

The witness was asked her opinion as to whether or not the plaintiff, George H. Dashiel, was of sound mind.

The defendant objected; objection was overruled, and the defendant then and there in open court excepted.

The Witness: In my opinion, his mind is affected, and has been ever since the injury. He is very nervous and cannot sleep nights; nearly ever since he has been hurt, I have had him right in my room with me—not all the time, of course; I frequently see him sitting up in bed holding his head; I would speak to him and he would say that his head hurt him so he couldn't sleep. After the accident, when he was brought home he had burns on his legs below the knees; they were very angry and had to be dressed and done up.

He enlisted in the Spanish-American war; I think he was in the army a year; I don't just remember how long it was before the injury, but I think it was about two years that he enlisted. I
50 have made an effort to have him treated since he has been injured, but hadn't the means to do so; I think he was thirty-nine years of age when he was injured, but I am not sure; have a record of his age; to the best of my recollection he was thirty-nine years of age when he was injured; I don't know how much work he has done since he has been injured, but he has done very little.

Cross examined:

My financial circumstances have not been such that I could have him treated as he should be; I have had him treated some by local physicians here in Ft. Worth, to keep him from being so nervous; I had no surgeon examine or treat him; I have not paid for the depositions taken in this case; his brothers paid for them. At the time he got hurt I was living within a block of him; I was living with Mr. Lane, my son-in-law; I was at his house when he

was brought in; it was twenty-five or thirty days before he went back to work; I was with him most of the time; he laid off that long; his condition was bad during that time. I did not consider him fit to go to work; his mind was not clear then and never has been since the injury; he talked irrational; he would get up and seemed to stagger and fall; at that time I formed an opinion that he was of unsound mind; I thought he was hurt; for twenty-five or thirty days after the accident, I can't say that he understood what he was doing; he seemed to be dazed, something like his appearance now, and has been since he came back from Mexico; he complained of being nervous and restless and pains in his head, just about the same condition he is in now. When he went out and worked awhile and came back his condition was about the same; he would commence talking on one subject and stop and commence on another. He has been complaining of his eyes ever since he was hurt; he reads very little; sometimes he talks about what he is reading and sometimes he don't; once in awhile I draw him out in conversation; he knows his family; he has not been down town much since he was brought back from New Mexico; he is kept right at home; after he went back to work he come home most every Saturday night or Sunday; he seemed to be dazed then; he would talk on one subject awhile and then another; he kept just about the same, I don't think he was worse then than he is now; my opinion is he was not right in mind any of the time; I was there when Doctor Fields was treating him; I don't know how long that was after he quit the service of the company; I know when Doctor Borders treated him; I was there then; after he quit the service of the road he didn't do anything; he
51 was not able to work; I suppose he come down town sometimes; I never saw him under the influence of whiskey; I don't know of my own knowledge that he has drank any since he was hurt; never had any conversation with him about drinking; I would see him when he would come home while he was working for the Rock Island; he still had that same irrational way; I think he worked for the Rock Island about two months; after he quit there I don't think he did anything until he left here to go to New Mexico; the same condition existed when he left for New Mexico—that nervousness, pain in his head; I saw him when he come back, he was in the same condition then; I didn't consult a lawyer as soon as he come back; I took him to a doctor first; when he joined the army he was living at Palestine; he was working for the I. & G. N. Railroad Company; I was not living there then; I saw letters from him while he was in the army; he was promoted while in the army; it is not true that his wife left him on account of his drinking, but because he was unable to further make her money and a support.

L. M. WHITTSITT, sworn for the plaintiff, testified as follows:

My name is L. M. Whittsitt; I am in the drug business; I am a graduate in pharmacy of Baltimore, Maryland; I have a place of

business in Ft. Worth, at 401 Elizabeth street; that is in the neighborhood of where Mr. Dashiel used to live; I knew Mr. Dashiel before he was injured; after he was injured and before he went to work again he would come in the store; the family was in the habit of trading at the store; the family did most of the purchasing, but Mr. Dashiel would come sometimes; along in the early spring of 1901, Dashiel would come in the store and get some little things, cigars, a sack of tobacco, or something of that sort for his own use; the family had an account there; he seemed to be different from what he used to be; he seemed to be abstracted, and acted funny as if he had been drinking; I noticed that several times; it drew my attention to him several times, but I didn't make any remark; not knowing that he was a drinking man—not knowing whether he drank or not, it didn't occur to me that perhaps he was drinking; there is a saloon right across the street from my drug store, and I had never seen him go in there; although he may be a drinking man his actions were not such as would have given the impression that he was drunk; it would seem he was a little morose at times
and then a little flighty; for some time then I missed him,
52 though I didn't think much about it; I missed him for about
a month; he came in the store one morning and he seemed to be further off in his actions from his natural condition than he formerly was; he would conduct himself strangely in the store; his actions were quite different from what they were several months before; so much so that, while I never made any remark about his condition prior to this, his peculiar action that day brought all these things to my memory and then I asked about him. I filled all these prescriptions; I have an account against Mr. Dashiel amounting in all to about ten dollars.

The prescriptions were offered in evidence.

That is the usual and customary charge for such medicines; that is reasonable.

Cross-examined:

My drug store was something like three blocks from where Mr. Dashiel lived; he was not in the habit of coming in the drug store a great many times; his family and children were; I knew him very well; it was along early in the spring that I noticed this change; I don't know just what time, but I know it was in the early part of the year; I don't know how long after he had been hurt, I didn't know he had been hurt for quite awhile; I observed this conduct before I heard that he had been hurt; I missed him for about a month and all at once he come back again and acted stranger than ever, and then I made up my mind that I would not sell him anything at all; he had been at work in the meantime, the length of time that I missed him; I would not sell him cigars. He did not want to buy morphine, or drugs of any kind, nor whiskey. It was not

on account of being afraid I would not get my pay that I shut off his trade, I had never questioned the account up to that time, but it was because his actions were so peculiar; I never saw him while he had the bandages on; I had never seen him drinking, and it is hard for me to say whether he acted like he had been on a spree or not; I think I noticed him about three times before he went to work, and one time after he come back; his actions were such when he came back that it caused me to make inquiries about him; I don't know how long it was after he come back; I never saw him at any time that I thought he was drinking.

Plaintiff rests.

53 JAMES MADISON a witness for the defendant, testified as follows:

My name is James Madison; I live in Ft. Worth, Texas; I am working for the Texas & Pacific Ry. Co. as a locomotive engineer; have been running as an engineer since about 1888; I was an engineer on December 24th, at the time the wreck occurred out near Eastland; Mr. Dashiel was conductor; Mr. Kincaid was fireman; Mr. Cheek was brakeman.

I cannot state the exact location of the train that was following us when I first saw it; I saw them all the way from Cisco to the place of the wreck, at times, of course; I presume they were about a mile behind us; after passing Eastland about three-quarters of a mile, the train was almost stopped; the brakes were set, as I discovered afterwards, from the hind end, and I supposed that the train had parted; that is what we always suspect, if the brakes are set from the rear; I lapped the brake-valve, and told the fireman to look out for the second shock; I saw the train was not parted, and I let the brakes release gradually, and we stretched out again; when the air was turned on from the rear it had the effect of slowing us right down; it would have stopped us, but I don't think we did quite stop; I looked back and got a go-ahead signal, what we called a "high-ball;" I took that to go ahead, as far as we were concerned, and we knew it was all right; we were running about 18 miles an hour, close on to that; we were making about time-card, I presume; the track was straight at that point; when I got that go-ahead signal, we were running about eight miles, I suppose; the train that was following us struck the caboose of our train; I didn't feel very much of a shock, but when they did strike it broke our train in two; our engine was working heavy, and when the train pulled in two it lunged ahead; I was running probably six or seven miles an hour; had just got stretched out and started; that was not a regular stopping place; I did not know why the air was set, or why the train was stopped; they told me right after the wreck that the air was applied from the rear; I did not inquire about why the air was turned on; it was told without inquiry; Mr. Dashiel was present when that was told; it was an ordinary night, so far as I remember;

it was not foggy and no obstruction, as well as I recollect; from the time the air was turned on until the collision occurred, it must have been five or six or seven minutes; when I went back to the rear, after the wreck, I saw Mr. Dashiel; he was standing right by the wreck; we took him to Ranger on my engine; he claimed
54 that he was hurt; his appearance didn't indicate very much, that is, in exterior *experience;* of course he looked pretty rough; his clothes were dirty, like all the rest of them, from rolling and tumbling around; the caboose turned over; he had gotten out when I got back to the wreck; I saw Mr. Burke; he was road master; he was on the rear train; Mr. Dashiel walked up to the engine and got on with the balance of us; we stayed there probably fifteen minutes after the wreck; there is a way of slowing down a train without setting the air, when you want to stop between stations; they can give the engineer a signal to slow down; the conductor has charge of the train; he gives the orders when he wants to stop and start; he has the authority to stop and start at any place; the engineer is under his control; his duty is to protect the rear end of his train; the rules are laid down in the book of rules for that purpose; when a train is running at night, and a train is following it, and the conductor knows that the train is going to stop or check up, it is his duty to protect the rear end of the train; trains are run under the supposition that another train is following it all the time; if a train breaks down between stations it is the duty of the conductor to send a brakeman back to protect the train; if another train is following, the conductor can give them a signal to stop or to slow down; that signal should be given from the rear end of the train; if I am following another train that is not making its regular time, he should give me a signal not to follow him too close; he should give me warning that he is not making regular time; I am familiar with the rules on the Texas & Pacific road; I was familiar with rule 14; that rule is that all trains must be run under the supposition that an irregular train may overtake them on any part of the road; a work train is an irregular train; Mr. Dashiel did not tell me that he had a man to let off at the Eastland section house; our train was what we call an irregular or extra train; the conductors are in the habit of notifying me themselves, or send word over by a brakeman, when they have a man to let off at a certain place; the purpose of that is that I will be prepared to stop the train, so I could stop the train and it would not have to be done from the rear; that is the more practical way than to turn the air on from the rear of the train; I did not run regular with Mr. Dashiel; I don't believe I ever run with him after the accident.

Cross-examination:

After the accident I made a personal injury report at two
55 different times; I did not state in these reports that I was running ten or twelve miles an hour; I don't remember that

that the rate of speed was discussed just after the accident, and that it was agreed that the train was running 10 or 12 miles an hour; I think probably we were running about seven miles an hour at the time of the collision; I never made a statement in your (Mr. Terrell's) office, to the effect that we were running ten or twelve miles an hour; to the best of my recollection I never stated that the train was running 10 or 12 miles an hour; the section house is a little less than a mile east of Eastland, I think about three-quarters of a mile; I think it was about a mile and a half, possibly, from Eastland to the place of the accident; it was inside of two miles I am satisfied; it is a little up-grade at the section house; at the point of the collision it was considerably up-grade; looking back from the point of the collision towards Eastland, I should say the track was straight pretty near a mile; the brakes were set from some place on the train, they were not set on the engine; I understood afterwards they were set from the rear end of the train; when a train parts, it sets the air all over the train; it sets the air immediately; I didn't know at first whether the train was broke in two or not; nobody can tell immediately; if the air hose break in two, the brakes are set; when the air is set the result is that the train stops; the first time I saw the rear train was at Eastland; I saw it as we were coming through Eastland; there is about a mile and a quarter of straight track, I can't say just what part of that track it was on, but I could see it as we come through Eastland; it was back west of there when I last saw it, somewhere in the neighborhood of a mile and a half west of Eastland; I can't tell just how far it was behind us when we passed through Eastland; it is a hard matter to locate the exact distance of a train following you; when the air was turned on, the first idea that struck me was that the train had parted; if the train is parted, the air in the reserve would escape; I lapped the valve to prevent the air from escaping; I don't know what time this section man got off; we got down to less than eight miles an hour; I might have been going eight miles an hour when I got this signal to go ahead; the train did come to a rate of speed of less than six or seven miles before the collision, it come almost to a stop; almost a stop would be two or three miles an hour, for about as fast as a man could walk; I never had a talk with Mr. Cheek, or in the presence of Mr. Cheek and others, about the train being running at the time of the collision, ten or twelve miles an hour; the train
56 following us was a work train; I had no orders for a work train to follow us; I don't believe we ever quite come to a stop; I received this signal to go ahead; when we passed through Eastland I presume we were running close to 18 miles an hour. I had no talk with William Childress about the collision immediately after it occurred; immediately after the collision I went back to the rear; Mr. Childress was on the rear of the other caboose—the head end as they were running; I did not hear him say that he gave any signal to his engineer; I did not hear him say that he jumped off, or anything particularly about how it occurred; after the signal

was given, I suppose we run about three-quarters of a mile before the collision occurred; no, I don't believe it was three-quarters of a mile; it was about a mile and a half back to Eastland; I don't know just the place we were when we got the signal; when we got the high-ball signal to go ahead we were east of the section house; I don't know how far that is from Eastland; I can't state how far we run from that point to where the collision occurred, probably about three or four hundred yards, may be twice that; when one train is following another, and the caboose is being pushed by the engine, red lights are supposed to be on the front end of the caboose; I never followed a train only as running an engine; I figure the distance by the curves on the road; when a train rounds a curve I know just about where it is; I expect it would be close to a mile from that curve in the track this side of Eastland to where the collision occurred; when I got back to the wreck, Mr. Dashiel was standing up by a little fire; I did not see him laying down on a cushion; we went right on over to Ranger in a very few minutes; he didn't lay down at all after I got there.

Re-direct examination:

The train never did come to a stand-still, but come almost; it is the duty of the conductor of the front train to protect the rear of his train; it is necessary that you send a flagman back to protect the rear of your train, even if you do not come to a full stop; it is a rule to send a flagman back, even if you do not come to a full stop, if you are not making time; when the air is applied in a case of that kind, and your train is slowed down, and you have to start up again, there is more or less danger of its breaking in two; that is the reason it is necessary to send a flagman back; a man with a lantern at night is called a flagman; I have had considerable experience in following other trains at night; I find it is difficult
57 to tell just how close you are to a train; I would not consider it necessary to send a flagman back if you are running eight miles an hour.

O. J. KINCADE, a witness for defendant, testified as follows:

My name is Kincade; I was fireman on the train that Mr. Madison was pulling at the time the wreck occurred out near Eastland; I did not know anything occurred until they came up and told me; before that we felt a little jar of the train, and thought at the time we had broke in two; after that the train come to a full stop; our train was run into by a work train; we met the work train as we were coming east, at Delmar; I didn't see it any more until after the accident; I didn't know anything about it following us; it was no part of my duty to be on the lookout for it; I did not go back to the scene of the wreck until after we started to breakfast; it is generally my duty to stay with the engine while the engineer goes and sees what the trouble is; after we got the wreck cleared up so

we could, we all went to breakfast down at the section house; we went from there to Ranger with a light engine; I mean by a light engine, we went with just the engine alone; we took Mr. Dashiel; I saw him when he got on; he sat on my side of the engine, from where we started, over to Ranger; he complained of being hurt, said he didn't think it was anything serious; seemed to be hurt on the shoulder blade more than any where else; he got off the engine without any help, and went in the telegraph office; I did not go in with him; he come back and got on the engine and went back to the wreck; the engineer, Mr. Dashiel and myself; my recollection is they all went back with us on the engine; I didn't know Mr. Dashiel at all personally, only just as conductor running on the train; I didn't run regularly with him. After the accident I worked with Mr. Dashiel at Red Bluff; that is about two miles the other side of Bennett Station, on the Brazos river, this side of Eastland; I was firing on the work train out there at the steam shovel; Mr. Collins was the engineer; Mr. Childress was the other brakeman; Mr. Dashiel was the conductor; I cannot say positively how long it was after the accident until Mr. Dashiel went to work; it was not a great while; I must have worked with him out there two or three months; we worked over a distance of five or six miles; at night
we stayed at Red Bluff, we had our boarding cars there; we
58 had the same boarding cars that Mr. Dashiel had; at night Mr. Dashiel, the engineer Mr. Collins and the operator, slept in there, and one of the brakemen; I slept on the engine; we all eat in the boarding car adjoining that car; I was out there at work when Mr. Dashiel came out to take charge as conductor; his duties were at the steam shovel to see that it worked the proper hours and see that the men under his control done their work, see that they got the train loaded and unloaded, and see to meeting and letting others by there, and hauling dirt to and from the shovel; I had opportunity, while he was out there at work, to observe him—his manner and condition; when he first came out there he seemed all right, and attended to business as well as anybody, but later on they had a good deal of trouble about drinking; I saw him drinking; I don't know how long it was after he came out there; when he was not under the influence of whiskey his demeanor and actions seemed to be just as good as anybody's; there was nothing to indicate to me that his mind was unbalanced—didn't show it in the least; he conversed rational; up to the time he began to drink he seemed to handle his work all right; his nature seemed to be a nice, quiet gentleman; I would sometimes be down at his boarding car at night; sometimes he would be making out his report, and sometimes they would be playing cards; I never at any time heard him make any complaint about suffering; the first time I ever noticed him drinking was one morning when we were leaving Ft. Worth; it was very cold, and there was a good deal of liquor on the engine; it was customary to come into Ft. Worth on Saturday night to have the engine worked on and the boiler washed out; I noticed Mr.

Dashiel was drinking; after we got out there and got in the dining car and got warmed up, Mr. Dashiel got past going; he was so drunk he couldn't go; I could smell liquor on him; he didn't work that day; he lay in the car and slept most of the day; it was a regular occurrence very near every day that several bottles would be brought out there on these trips when we come from Ft. Worth; I have seen him drinking out there in what we call the operator's car, or where he slept; Mr. Fowler the brakeman, drank with him; the engineer and the operator drank with him; I remember a jamboree they had out there one time; we had to take one of the brakemen and nail him down to the bunk to keep him from getting run over; Mr. Dashiel was there, I believe he was helping do the job; he was not drinking at that time; I know of whiskey being brought out there other than on these trips we made to Ft. Worth; a man was sent to Weatherford and
59 got two gallons and a half at one time; Mr. Dashiel sent him; he was a section man; it was put there in the car; I saw Mr. Dashiel drink out of the jug; it is hard to tell how much a man drinks out of a jug; Mr. Dashiel might be drunk for two or three days, and then be sober for the rest of the week; when he would get sober, or get out from under the influence of it he was just the same as any man; he was capable of handling his train; I was there when he left; as well as I remember, Mr. Ward came out and relieved him; it hadn't been long since he had been drinking, when Mr. Ward relieved him; we came down to Ft. Worth every Saturday night; I remember twice of noticing him being under the influence of whiskey, on these trips; I saw him one Sunday afternoon up on Rusk street, under the influence of whiskey, while we were at work out there; he was pretty well loaded then; I don't know how often towards the latter part of the time he was out there that he was drunk at night; I was not at the car every night; I had business to attend to on the engine; one night they stayed up until 3 o'clock in the morning, drinking and playing cards; I have seen them playing cards, saw him playing cards while under the influence of whiskey; he got two gallons from Thurber once, and two gallons from Weatherford once; I never saw him after he quit the service.

Cross-examination:

I stated that we passed this train that ran into our train, at Delmar; it was standing still on the side-track, with the engine headed west; it was up-grade where the collision occurred; I don't know how far back it was up-grade; I went back to the section house next morning from the wreck; I cannot say how far it was from the wreck to the section house; it was not very far; it has been quite a while since I have been over that road, and I have forgotten it; I am still in the employ of the Texas & Pacific railway, and so is Mr. Madison; I never knew Mr. Dashiel before this wreck occurred, only

just by sight, never saw him drunk while in the service of the Texas & Pacific before the accident; when we took him down to Ranger after the accident I did not notice his head being hurt, saw no blood on his face; the only thing he complained of was a hurt in the shoulder blade on the right side; I saw no evidence of his being hurt on the head; he got off my side of the engine, got down on the gangway, and went into the telegraph office and come back out and got on the engine and went to the wreck; he didn't
60 come back to Ranger any more until we got the wreck cleared; I cannot tell what time we got the wreck cleared; it was the next day, but I don't know what hour; I cannot say how fast the train was running at the time of the collision; I don't think it was running over 10 or 12 miles an hour, if that fast; it was a pretty heavy train; the train never come to a full stop before the collision; at the time I speak of Mr. Dashiel's working at Red Bluff, I did not drink any of the whiskey brought there; I never touched a drop in my life; Mr. Fowler, the brakeman, did, and also Mr. Collins the engineer; I cannot say whether Fowler is still in the employ of the company or not; the engineer was in the hospital the last I knew of him; I stated that probably a couple of days in the week Mr. Dashiel would be drunk, and the balance of the week he would be sober; I have observed him in the court room; I notice some difference in his appearance now and then; he don't look bright like he did before, looks like he had been sick, to me; it has been pretty near two years since I saw him, and a man can change a good deal in that time; I don't know that I can say whether it is more dangerous to run trains with the engine pushing the cars than to have the engine ahead of the cars pulling them; if properly protected, I should think it would be as safe as if the engine were in front; the engineer could not protect the forward end of the train when backing up, as well as he could if the engine were in front.

Re-direct examination:

With the engine in front of the cars, with the cow-catcher next to the cars, the tender would be in front; that would obstruct the view of the engineer, to a certain extent; I believe there is a "Y" at Cisco, where the engine could be turned around; the "Y" at that time was full of cars loaded with cotton; it had been blocked for some time; traffic was very heavy at that time.

Dr. G. H. FITZGERALD, a witness for defendant, testified as follows:

My name is G. H. Fitzgerald; I am a practicing physician; I live at Albuquerque, New Mexico; I have been practicing since 1898; I am a graduate of the Cleveland College of Physicians and Surgeons; in April of last year I was in Almagorda, N. M., I
61 think it was in May or June I was in Almagorda; I had charge of the hospital for the El Paso & Northeastern rail-

road; it was my duty to examine applicants for service on the El Paso & Northeastern; when I examined a man who is seeking employment, I make a report on them; I made a report of my examination of Mr. Dashiel; Mr. Dashiel was seeking employment, and came to me with a note from the master mechanic or superintendent, requesting me to make the examination before he could be employed; I remember examining him; I first asked him general questions as to his general health, whether or not he was in good health at the time, then examined the chest—the lungs and heart, and then the abdomen; the object of the examination was to determine whether or not he was physically sound; he represented to me that he was in good health, that he was a strong, healthy man; he made no statement to me that his mind was in any way wrong, that I recollect; if he had, I would have made a memorandum of it; he made no statement or pretense of anything being wrong with his head, that I recollect; if he had, I would have made a note of it; he answered all questions intelligibly; there was nothing in his conversation or his statements or appearance that impressed me that he was not rational or at himself; the result of the examination is in this blank; I simply, in general terms, stated that he was all right; I tested his eyes; I tested him by placing a card with letters on it of different sizes and at different distances from him; I tested his eyes separately and both together; my conclusion with reference to his eyes was that he had normal vision.

Cross examination:

It is not my experience that a man who has been sick and out of employment for some time, when he is seeking employment, will state that he is deranged or insane; the tendency is to deny that; I made no examination of his head for injuries, except a general inspection; in examining his eyes, I examined each separately, and both together; one eye was examined carefully, and then the other; one eye appeared a little larger than the other; I did not use a prism; a prism is the most sure test of the actual vision of the eyes; I do not know how long he worked out there; he was not drunk when he applied to me, that I recollect; I think that gentleman sitting there is the man I examined; I don't recollect that there was any difference in his appearance then and now; a man may be deranged mentally, to a greater or less extent, and still remember names, dates and places, and be able to work.

62 Re-direct examination:

There is some difference in a man's expression when he sits down and engaged in conversation and when he is not engaged in conversation.

S. M. BERRY, a witness for defendant, testified as follows:

My name is S. M. Berry; I live at Thurber; I am yard master for the Texas & Pacific, at Thurber; I was on the train when the collision occurred when Mr. Dashiel was hurt; I was on the head train—the train on which Mr. Dashiel was conductor; I was acting as rear brakeman; I remember when we passed Eastland that night; the collision occurred soon after that; a section foreman was riding in the caboose that night, besides the regular crew of the train; I don't remember where he got on; Mr. Dashiel told me that we had a section man to let off there; I kept giving signals to the engineer; he didn't take the signal, and I went over the car and touched the air lightly; I touched the angle cock; that had the effect of setting the air and applied the brakes, which of course slowed down the train; the section foreman got off and gave a signal at once to go ahead; I don't remember how many cars I was from the caboose; I got off the train and caught the caboose as it came by me; I got off on the ground, on the right hand side coming this way; I got off after the high-ball signal was given; I did not see the section foreman when he got off; I got back on the caboose; he was off then; I went inside the caboose and fixed the fire in the stove; Mr. Dashiel went in with me; the next thing we knew something hit; it tore the caboose up considerably; I can't remember whether it turned it over or not, I can't say how I got out; I was hurt in the wreck; we did not stop at Eastland; before we reached there I had no notice or information that this section man was to get off at the section house; we were running about 15 or 20 miles an hour; we slowed down when we let section man off to 10 or 12 miles an hour; it was running about the same speed when I got on; I got on from the ground; I paid no particular attention to the speed we were running; I saw Mr. Dashiel after the accident; I was carried to Eastland; Mr. Dashiel went to Ranger; I saw Mr. Dashiel again in six or seven days; he come down to my house here in Fort Worth, he come down to see me; I had a talk with him; he talked like he always did to me; I couldn't see any difference; he seemed to me to be rational and in
63 his right mind; after that a while he was down to see me again; I couldn't see any difference in his appearance or demeanor; he come to see how I was getting along; I was off 37 days; I never run with him any more; I saw him again while he was at work as conductor on the work train, at Red Bluff; I spoke to him several times; he seemed to be all right; after the train slowed down, and I got on the caboose again, I saw the train following us; it was a little over a quarter of a mile from us, might have been further than that; there was no slow signal, or anything of that kind, given to the train following us; when I got on the train, Mr. Dashiel was on the rear platform of the caboose; we both went in together, one right behind the other; I could see the red lights of the caboose following us, the caboose was in front.

Cross examination:

They were about a quarter of a mile from us; they might have been a little further; I don't know how long it would take to run a quarter of a mile when it is running at the rate of fifteen or eighteen miles an hour; I would have to figure that; after I got back in the caboose I put some coal in the stove; that didn't take very long—four or five minutes I guess; the track back towards the rear train was straight; we were going up hill; both trains were running up hill; I don't know how far it was from the place of the accident back to the section house, I suppose it was very — half a mile; it is a mile and a half or two miles from the place of the accident back to Eastland; I have had a great deal of experience as brakeman; the angle cock is to apply the air; if the angle cock was applied to a train of three or four cars running up grade at the rate of 15 or 18 miles an hour, I cannot tell at what distance it would stop the train; it would be owing to how you applied the air; if you open it wide open it will stop the train very soon, in about eight or ten or twelve car lengths; I can't say what Mr. Dashiel was doing after the accident; we were all there together for a few minutes; we were both laying down there by the fire; Mr. Dashiel complained of his back; I didn't see any bruises on his head; I couldn't see much; I have been promoted to yard master for defendant at Thurber; I said Mr. Dashiel visited my house some time after the accident, six or seven days, I am not positive how many days it was afterwards; his head was tied up; I cannot see any difference in his appearance now and what it was before the injury; he is bleached up a little, is about all the difference I can tell.

64 Re-direct examination:

I was just passing the section house when I turned on the air; the foreman got off a little this side of the section house; it is the rule to notify the engineer when you have a man to let off; that enables him to stop or slow down the train sufficiently for the man to get off; he does that in order to avoid putting on the air; and the engineer can stop himself; I didn't apply the air full; it takes about a minute to apply the air, and then the engineer to release it; I don't know exactly how long it would take; it would not take long; I was promoted the 13th of January a year ago, I believe.

L. C. SCHWICK, a witness for defendant, testified as follows:

My name is L. C. Schwick; I live at Ft. Worth; I am roundhouse foreman for the Texas & Pacific; in December, 1900, I was running an engine; I remember the wreck; I was on the work train—the rear train at the time of the accident, as engineer; we were coming towards Ft. Worth; our orders were for Thurber junction, I think; we started to follow this front train at Delmar; we overtook it at Cisco; we lay over at Cisco four or five hours; after the front train started from Cisco it was about five or ten min-

utes before we started; we were running on orders from the superintendent; I don't remember whether we met any train at Eastland or not; I can't say how many times I saw the head train after we left Cisco, up to the time the accident occurred; I saw it several times; my engine was backing up; the tank was next to the cars, and the engine was headed west; I think I had five cars ahead, or east of us, I am not certain; on work trains we sometimes have the engine ahead and sometimes behind; we went out to Putnam that day; we started from the east, and our engine was headed west.

Q. What is the usual, customary—what is the practice with reference to running work trains between the stations, to come back—what is the customary or practical way of handling it?

Plaintiff objected to any testimony as to the custom of running trains or engines backwards; I don't think the usage and custom should control in a case like this.

The court sustained the objection, to which ruling of the court the defendant, in open court, excepted.

65 When we are out on the road between stations with a work train it is not always practicable to turn the engine around; n order to turn an engine, we must have a turn table or a "Y;" there is a "Y" at Cisco and at Thurber Junction; the "Y" track at Cisco was badly blocked and in very bad condition; it was not practicable on that occasion to turn our engine at Cisco; we could have put the engine at the east end of the cars; the tender would then have been in front of the engine; it is more safe to run a train with the caboose in front than to have the engine in front with the tender in front of the engine; there would be more men on the caboose to look out; they have a better chance to keep a lookout; you can keep a lookout from the caboose of the train; the engineer gets his signals from the rear end of the train; in a case of this kind, it would be the front end; in case of an emergency, there is an angle-cock on the caboose by which you can stop the train; that turns on the air, that will set the air on the engine; if the engine is in front of the cars, and the tank in front of the engine, it will obstruct the view to some extent; the last time I saw the train ahead of us it was about a mile ahead of us; at the time of the accident we were running about seven or ten miles an hour; before that we were running something like 20 miles an hour; we were going upgrade at the time of the accident; I did not know we were going to have an accident until it happened; it had very little effect on my engine, I noticed it very little; there were red lights on the caboose of the head train; there was also red lights on our caboose approaching it; there was supposed to be a watch or brakeman on the caboose on our train; there was some one on the front end of our caboose; if a signal had been given from the front train that they were slowing down, or about to stop, the brakeman on the rear train would turn on the air; he did not do it on this occasion; no air was

turned on; if the air had been turned on it would have affected the engine; it would slow up or stop the train; if it was turned on full it would not be long in stopping.

Cross examination:

I am not now operating an engine; I was taken from the operating department in January, 1902; at the time of the accident, I was running on orders from the superintendent—Mr. Ward; we had orders to come to Thurber Junction; that was Christmas Eve night; we had no orders further than Thurber; we would get orders there;
I don't know that we were in any more hurry to get to Ft.
66 Worth than at any other time; there was a siding at Cisco and also at Eastland, where we could have put the engine in front of the cars; there is more chance for a better lookout when you run the caboose in front than to run the engine in front with the tank ahead of the engine; there is not as much obstruction to the engineer, but there is a better chance for a lookout; there is nothing to obstruct the men on the caboose; that is, provided the rear brakeman is on the lookout and gives the engineer the proper signals; I saw the train about a mile before the collision, that is the last time I saw it; I saw no signal between that time and the time of the collision, from the rear brakeman, Childress; I knew there was a train in front of us; we passed through Eastland running about 15 or 18 miles an hour, possibly 20; I saw the train in front of us before we got to Eastland; it is requisite that I should be on the safe side and keep a vigilant lookout ahead; I had appliances on the engine by which I could have readily stopped the train; we were running up hill about seven to ten miles an hour; I could not have stopped the train within two or three car lengths; I could have stopped it in 20 or 30 car lengths; I don't know what distance that would be; I have never figured that out; we were running under orders and not under cover of a front train; I don't remember passing a train at Eastland; we didn't slow up at Eastland; it is about level at Eastland; out of Eastland it is a little up-grade; if the front train was running 10 or 12 miles an hour and our train running six, seven or eight miles an hour, there would be no necessity for a slow signal from the front train; the regular time between trains running in the same direction is five minutes; defendant had a rule at time and place of collision that one freight train should not follow another at a closer space in time than five (5) minutes; I was running closer to this train than five minutes when I was a mile behind it; that was the distance (5 minutes) in space of time they must be apart, except when you are coming to a meeting point; we rely on the lookout on the caboose; if I had been in front of the cars with the tender ahead of me, I would have been more able to see the front train than I was.

Re-direct examination:

It is very difficult to tell just what distance a train is ahead of you at night; it is easier to tell the distance where the track is not straight; when a train rounds a curve you can locate the distance better; you have some object to go by; the man on the head train should be constantly on the lookout for trains following him; in case the rear train gets too close to him he should give some
67 warning, either by signal or placing a torpedo on the track; he could give a flag signal or a lantern at night; if the train slows down the rear train should be given a signal.

Dr. G. V. MORTON, a witness for defendant, testified as follows:

My name is G. V. Morton; I am a practicing physician; have been since 1897; I graduated from the school here, the Ft. Worth university; I took a post-graduate course in Chicago; my office is at 312 Main street; I am associated with Drs. Field and Duringer; Dr. Duringer is surgeon for the Rock Island railroad; I have had occasion to make examinations for him of persons who seek employment on the Rock Island road; when he is out of town, the applicants are turned over to me; Dr. Field and myself are both authorized to attend to his business; I have here a surgeon's report blank; I filled this out and signed Dr. Duringer's name to it; this is my handwriting; this report is the result of an examination for a position on the Rock Island; I examined George H. Dashiel on August 13, 1901; Mr. Dashiel brought this to me himself to be examined to get employment on the Rock Island; I made the examination to see if he was capable of filling the position of conductor on the Rock Island—physically able to fill the position; I examined him as to his senses of seeing and hearing, tested his eyes as to reading at certain distances, and as to colors; I gave him a thorough physical examination of all vital parts; I first tested one eye and then the other; I tested his eyes by placing letters at different distances from him; the letters are not consecutive, A, B and C, but are scattered; I would first blind one eye and then the other, and have him call off the letters; the result of my examination was that I passed Mr. Dashiel as being physically a first-class subject to fill the position of conductor; I made a perfect report on his eyes, as far as I examined him; his eyesight was good; if he had been blind in one eye I could have detected it, from the examination I made; he made no statement to me that he was unable to work; I don't think that question was asked, as to whether or not he was able to work; I don't see anything in this statement with reference to his stating anything about his general condition; I discovered nothing about him to impress me that he was abnormal; he made a rational statement to me; he had no difficulty in expressing himself.

68 Cross examination:

It is possible for a person to have an injury to the eye, caused from nervous trouble, and it will be progressive, and he may finally be-

come blind; I am a member of the firm of Field, Duringer & Morton; our firm are surgeons for the Rock Island railroad, and also for the Missouri, Kansas & Texas, and I think Dr. Duringer represents the Houston & Texas Central; I don't remember how long it took to make that examination; I had him read these letters about fifteen feet from him; I did not use the prism; I tested him sufficiently, as I thought, to fill this position; it is possible for a man to be abnormal in his mind and still answer questions about business matters, remember dates and faces, and things of that kind and still be deranged mentally.

D. ELLIOTT, a witness for defendant, testified as follows:

My name is D. Elliott; I am section foreman; I work at Red Bluff; have been section foreman about three years; I remember when Mr. Dashiel was working out at Red Bluff in charge of the work train; I was running the section at that time; my headquarters was about a mile this way from the cars; I can't say just exactly how long Mr. Dashiel was out there; it was something like two or three months; he was conductor of the work train; I did not know him prior to that time; we just worked around there together; he was conductor of the train, and I was working around there; I was there only a part of the time; I have talked with him; I never noticed him drinking; I did not eat at the same place with him; he was running the train and I was running the section; when I saw him and talked with him he was all right, so far as I know; he was rational, as far as I know; never heard him make any complaint; nothing to indicate that anything was the matter with his mind.

Cross-examination:

I saw him quite often, sometimes twenty times a day, sometimes may be once a day; he was out there something like two months; I never saw him drunk; I never noticed him under the influence of whiskey; I never saw him every day; I might go there two or three days and not see him, and then I would see him every day in the week.

69 Re-direct examination:

I was not with him at night; my section reached about three miles each way—about two miles west from where they were; I never knew Mr. Dashiel before this accident.

Mrs. A. J. SMITH, a witness for defendant, testified as follows:

My name is Mrs. A. J. Smith; I remember when Mr. Dashiel was at work at Red Bluff; he was conductor running the work train; I was running the boarding car; I knew him there something over two months; he came there some time the latter part of January; I

don't know why he left, positively; he never told me why he left; when I saw him last he was not in a condition to tell me; I have seen him time and time again when he was under the influence of whiskey; I saw him at one time for about four days when he was intoxicated; he was a perfect gentleman in his manners, only he couldn't walk straight; I could smell whiskey on his breath; he come to his meals in the dining car; he slept in another car; it was connected with the dining car, or the second car, I believe; he was at himself, knew everything, but he couldn't walk straight all the time; I saw him three times a day, and then I saw him passing round; I never knew him prior to that time; had no particular conversation with him; of course at times there would be words passed; I waited on him at the table, and talked to him in the ordinary way; I considered him perfectly rational and intelligent when he was not under the influence of whiskey; he talked very intelligently; he had no hesitancy in speaking—no stoppage; I considered him a very intelligent man; there was nothing in the least that indicated to me that there was anything unusual about him; he never complained or made any statement about his head hurting him or bothering him; I know there was whiskey brought there, and I knew it was drank; at one time I emptied a one gallon jug; it was hidden between the ends of the crossties, near the car; I do not know, of my own knowledge, who put it there; it was right near my car; that was about three or four days after they commenced to drink whiskey; I mean by "they," Mr. Fowler, the brakeman, and the operator; they were all having a good time there together.

Cross-examination:

He had sobered up when I saw him last; he did not com-
70 plain of any hurt; he seemed to be as bright as he was before; I think that was in March; I remember his saying that he had been in a wreck.

PAT SHEA, a witness for defendant, testified as follows:

My name is Pat Shea; I am a freight conductor on the Texas & Pacific railroad; I was on the work train at the time of the collision; we began following the other train about Cisco; I was riding in the caboose; we were several minutes behind Dashiel's train when we left; we stopped after leaving Cisco, at Lem; we did not stop at Eastland; the first thing that attracted my attention, we run right up against the other train; I did not see the train before we struck it, that is, just before we struck it; I saw him about half a mile, then the next I saw of him we were right on to him; it was a straight track; I could see his red lights; it was a very dark night; it is kind of difficult to tell the exact distance you are off from a train at night; when a train is running between stations, the conductor should protect his train from trains following in the event it should happen that he should have to stop; it is supposed that a train is

following at any time during the day or night; he is supposed to be on the lookout at all times; where the train is running between stations, and it becomes necessary to stop or slow down for any purpose, and a train is following, it is the duty of the conductor to send a flagman back to warn the approaching train that he is stopping, or about to stop; I got no signal from the front train that night; I saw no lantern or torpedoes; if I had gotten a slow signal I would have slowed down or stopped; I could have done that by giving the engineer a signal, or I could have used the anglecock and set the air brakes; when a flagman comes back it is only to warn you, it is not an emergency stop, or at least it depends on what sort of signal he gives you whether you come to a full stop or not.

Cross-examination:

William Childress was by head brakeman; he is here to-day; I don't know whether he wore glasses at the time of the collision or not; at the time of the collision I was looking ahead watching these red lights; it was a rule of defendant at time and place of collision that you shall not run freight trains closer than five minutes to each other; that was the rule at that time; they were required to
71 be at least 5 minutes apart; when we were half a mile behind, I supposed we were within three or four minutes; we were running about 10 miles an hour; when we passed through Eastland we were running eight or ten miles an hour; we hadn't increased or diminished our speed much; we were not running fifteen or twenty miles an hour at the time of the accident; Mr. Childress was on the front platform of the caboose—the front end the way we were going; if the front train was running over ten miles an hour it was running at a greater rate of speed than we were; it was just as difficult for the men on the front train to see how far we were behind as for us to see how far they were in front; I may have had some words with Mr. Childress at the time and place of the accident—not right at the time, but I don't know what was said, if anything; I did not hear him make an explanation; he did not say he jumped off the train; I didn't ask him if he applied the angle-cock; I can't say now whether he said he did or not; my train did not stop until the collision occurred; it did not slacken its speed; we had three cars and a caboose; we were running up hill; a train running 12 miles an hour with that number of cars, should the air be applied, it would stop within 150 or 200 feet; it would depend a great deal on conditions; the track was kind of damp, kind of dewey; I saw Mr. Dashiel after the collision occurred; he went to Ranger afterward; I did not see him lying on his cot; the first I saw of him he was laying on the ground; he complained of being hurt around his leg and back; there was a little blood running down his cheek; I don't know how bad he was hurt; I had run over that road often before; I am still in the employ of the company; there is a curve as you come east from Eastland; it is 100

yards I reckon from the depot; I was running the proper distance behind the other train, coming through Eastland; we passed two trains on the siding at Eastland; I had orders to meet a train at Eastland; when Mr. Dashiel turned the curve at Eastland I was a mile and a half behind him; I stated that the brakeman was on the front platform, that is, he was on the east end of the caboose; I was sitting up in the cupola of the caboose; Mr. Childress on the front part of the platform, could not as readily see the train as if he had been on the top; my view of the train was unobstructed; I saw the front train; I realized that we were approaching it; when I started with my lantern it was a little too late, it seemed to come to a stop.

Re-direct examination:

When I realized we were going to have a collision, we were
72 right on him; if the air had been applied in emergency at the time I discovered we were about to have a collision, we would not have hit them as hard as we did.

The COURT: So that if the engine had been where your caboose was, or the engineer, having command of the air, had applied it at the time you saw the train in front of you, or a minute or two before the accident, it might have been avoided, or lessened in degree?

A. Yes, it might.

The COURT: It probably would, would it not?

A. I don't know; that is pretty hard to say.

Re-direct examination resumed:

Mr. Dashiel told me at Cisco that he was going to let off a section man at the section house; the section house is about a quarter of a mile west of where the accident occurred; the reason I didn't turn my engine at Cisco was because the "Y" was blocked with cars; it was not practicable to turn it under the conditions existing there.

Re-cross-examination:

Mr. Dashiel told me at Cisco that he was going to let a section man off at the Eastland section house; Mr. Burke was with him; there is no turn-table at Cisco; there is a "Y" there; the Texas Central had the "Y" blocked with cars; we stayed at Cisco about three hours, two or three hours, I don't know how long; it would take quite a while to turn in the right direction, under the conditions that existed there; it would not take two or three hours; I expected that train to stop at the section house; we run our train under control, expecting to find it there; after we turned the curve, that was the first view we had of it, after passing Eastland; we

couldn't see them as we come through Eastland; we had to run about 100 yards before we got in that curve; they were past the section house; when we rounded the curve, if that train had been standing at the section house we could have stopped our train; there is a straight track from the curve coming on east, about two miles; it was about a quarter of a mile east of the section house where the accident occurred; there is a bridge between the section house and the place of the collision; I have never measured the distance.

73 J. O. BOWLES, a witness for defendant testified as follows: My name is J. O. Bowles; I live at Ft. Worth; my business is that of conductor for the Texas & Pacific railroad; I know George H. Dashiel; I have known him for six or seven years; I first knew him on the M. K. & T. railroad; at that time I was living at Smithville; Mr. Dashiel worked north of Hillsboro, and I worked south, and all the time I met him would be when we come into Hillsboro; Hillsboro was a terminal; I remember about the time it was said he met with an accident; I saw him after that; I met him at a number of places; I was on a local and he was on the work train out at Red Bluff; I knew him while he was running on the road before that; I saw him in passing Red Bluff; I would talk to him sometimes; I saw nothing wrong with him; he was performing his duties there as conductor on the work train; I saw no difference in him then and when I had seen him on the Katy; he was always of a cheerful, jolly disposition; he talked intelligently; we used to get after him about laying us out with his construction work, and he said he couldn't help it; I remember about the time he quit the service: I know the circumstances; I saw him a number of times afterwards; he was under the influence of whiskey; I cannot say how many times; one time I remember several of us walked over on the corner from the depot and got a drink, and while in there Mr. Dashiel and three or four other men came in, and all were drinking; Mr. Dashiel got to relating his trouble about being discharged out there; I should judge this was a week or ten days afterwards, I don't remember just how long it was; I met him afterwards and had a conversation with him, probably ten or fifteen minutes; he was rational, so far as I could tell; I couldn't tell any difference in him then than before; he remarked that he had been sick; he had his slippers on, and had a walking cane, said he was not feeling well; I did not notice any difference in his talk; he was just the same as he was when I knew him at Hillsboro, I couldn't tell any difference; I saw him under the influence of whiskey after he was discharged; I guess I saw him as much as three or four times after he was discharged; I just run across him as one railroad man will another; I saw him in a saloon.

Q. I will ask you if you know what his general reputation was while you knew him at Hillsboro, with reference to being a drinking or a sober man.

Plaintiff objected, because incompetent, irrelevant and im-
74 material and because the question sought to elicit hearsay testimony.

The court sustained the objection, to which ruling of the court the defendant in open court excepted.

I run the first train through there after the accident; to the best of my knowledge, the section house is 150 yards east of the Eastland siding and the section house must be 100 yards east of that; this accident occurred, as well as I remember, about as far from the section house, as it is from the section house to the station; after you pass the section house there is a little sag, and then you start up hill; when you start up hill, that is where the accident occurred; I should judge that the section house is just about half way between where the collision occurred and the station; the curve is pretty near half way between the section house and the depot; in running trains, the conductor has control of them; it is the duty of a conductor to protect the rear end of his train; if a train slows down, and the train following is running at a high rate of speed, it is the duty of the conductor to flag him; I mean by that, to send a flagman back with a red lantern and a white lantern; in running a train, it is supposed that at all times a train is following; a signal could be given from the rear end of the train to the approaching train, to slow up, that is sometimes done.

Cross-examination:

I was conductor at the time Mr. Dashiel was hurt; I don't know how long Mr Dashiel had been in the service; he commenced as brakeman, and was promoted to conductor; where a train is slowed down it is the duty of the conductor to send a flagman back to protect his train; the flagman would be picked up by the train following him; I should think it would be better to run a train with the engine in front of it; I met Mr. Dashiel quite often before this accident; he seemed to be a bright intelligent railroad man; I cannot say as to his being a sober man before the accident; I never knew of his drinking before the accident while he was in the service of the Texas & Pacific.

Re-direct examination:

It is not always practicable in running work trains between stations, to have the engine in front of the cars.

75 J. W. WARD, a witness for defendant, testified as follows:

My name is J. W. Ward; I live at Big Springs; I am division superintendent between here and El Paso for the Texas & Pacific railroad; I occupied the same position in December, 1900; Mr. Dashiel was conductor part of the time; I had known Mr. Da-

shiel about eight months; I saw quite a good deal of him; I was not at the place of the accident; I passed there afterwards; I know where it occurred; it is between a mile and a quarter and a mile and a half from the depot to the place of the accident; the section house is located very nearly in the center of the distance from the station; the curve commences I should say about 450 or 500 feet east of the station; the curve is about a six hundred foot curve; the section house is very near a quarter of a mile east of the east point of the curve; as soon as you pass a little over half the distance of the curve, you could see a train in front of you; that would be a little over a quarter of a mile from the section house; after the accident, Mr. Dashiel still continued in the service of the company; I saw him after the accident; I think it was four or five or seven days; I saw him here in Ft. Worth; he was up in the office—in the dispatcher's office; that is down in the Union depot; I had a talk with him; his appearance was all right, except he had a bandage around his head at the time; he said that he would be able to work in a day or so; there was nothing to indicate that he was out of his usual condition; he appeared to be all right, except having been shaken up a little; he was perfectly rational, as much so as I ever saw him; he made a statement; I next saw him in ten or fifteen days here in Ft. Worth; he had gone to work then; while he was at work out at Red Bluff I would see him probably one day in the week, and some weeks I would be out there two or three days, just as the condition of the work demanded my attention; I would talk with him about the business every time I was there; the job of work being done there was very expensive, it cost about three hundred dollars a day, and I would talk to him about the work and give him instructions, and he would give me his idea about the work, and so on; I noticed nothing in the world about him abnormal; if I had found anything of the kind I certainly would not have allowed him to go to work or remain in the service; I certainly could not have afforded to do anything of that kind; I am responsible for all the men under me; I have general supervision of their employment.

Mr. Dashiel quit the service of the Texas & Pacific Railway Co. on or about the 23rd of March, 1901; he was discharged by
76 me; I discharged him on account of reports which came to me, and which I investigated and found to be true; I don't remember to have found him drunk at any time when I was at Red Bluff; I was down here at court when he had his last big drunk; I discharged him on account of his inability to attend to his work, and entrusting the work to his subordinates; I mean by inability, that he was unable to be out on the work and attend to it on account of being intoxicated; I have the train sheet here which will show when he went back to work; I have gone over the records and ascertained the dates when he went to work after the accident; the accident occurred on December 24th; he commenced work on January 3, 1901; he made one trip to Baird and return, as conductor; he left Baird on his return trip on the 5th, got to Ft. Worth on the

6th, and did not run any more until the 16th; the next run was made on the 17th, and the next on the 22nd; on the 22nd he went to Red Bluff, and was on the work train the 22nd, 23rd, 24th, 25th, 26th, and came back to Ft. Worth; on the 27th he left Ft. Worth and went to Baird, and was on the road the 28th, 29th and 30th of January, running as a through freight conductor between here and Baird; February 1st he was also on the road coming from Baird to Ft. Worth; and on February 2nd or 3rd he went to Red Bluff and took charge of the steam shovel, and remained there until he left the service, which was March 23rd, I think was the last day he worked; from the time he went to Red Bluff on the 2nd or 3rd of February until the 23rd of March he worked continually, at Red Bluff the most of the time we had but one engine and one train crew, but part of the time we had two engines and two train crews, and he was in charge; I looked to him the same as I would to a yard master; I selected Mr. Dashiel as a man who could handle that class of work; it took a good, strong healthy man, conversant with railroad work; a man who would be careful in handling his trains; in many respects it is a more difficult position than running regularly on the road; I know Mr. Dashiel's signature; that is an application from Mr. Dashiel when he went to work as conductor; it is dated October 24, 1900; that application was not taken up at the time he entered the service; that is the date he made application; he had been running as a brakeman before that; this is a letter I received from him; that is in his handwriting; this application from the El Paso & Northeastern and the Rock Island I take it, bears his signature also; I think they are identical; I have Mr. Dashiel's report to the company of the accident, it is not dated, but it was made shortly after the accident; it is made on the usual form; I saw Mr. Dashiel two or three times after he quit the
77 service, saw him in the dispatcher's office down at the Union station, and once in Dallas, and once on the street in front of Starling's cigar store; he was under the influence of whiskey at that time; that was some time after he had been relieved; when I saw him in Dallas he was in the general office, in the office of the assistant superintendent of telegraph; when I saw him under the influence of whiskey he was what I call about on his last pegs; he was badly under the influence of liquor; I could smell it on his breath very distinctly; I didn't talk to him at all; he was talking to a couple of men on the sidewalk; I saw him after the accident when he was sober, I mean after he was relieved; I think those three times were the only times I ever met him; I claim to be familiar with the rules and regulations of running trains; when a train is running between stations, it is always run under the supposition that another train is following and may overtake it at any moment; if the train should come to a stop it would be the duty of the conductor to direct his flagman to go back with a red lantern or torpedoes and warn the approaching train; in event the train slowed down and did not come to a stop he generally directs his flagman to

stand on the platform and see that the rear of his train is protected; the rear brakeman acts as flagman; a red lantern is considered a signal of danger at all times; the rear brakeman should be in the position to signal the approaching train with his red lights so the following train can reduce its speed to conform with the front train.

Cross examination:

Where a train has slackened its speed say to let a section man off, and then is given a signal at once to go ahead, the conductor and the brakeman go into the caboose, the brakeman puts coal on the fire, and the train has gained its normal speed, some four or five minutes having elapsed, there would be no necessity for flagging the train, if such circumstances existed; the rules of our company permit trains to be run with the engine pushing the cars; that is done every month, running 18 or 20 miles an hour; we have no rule or instruction to discharge a man who passes a "Y" or switch where the engine can be turned around and gotten in the right direction, and does not do it; we have no regulation on that subject; every train running at night is in more or less danger of running over something, whether the engine is in front or in the rear; where one train is following close behind another, of course the element of
78 danger is increased; from Putnam to Baird it is 17 or 18 miles; that is west of Delmar; there is a "Y" at Baird where the engine could have been turned; there are side tracks at both Putnam and Delmar; it would take in the neighborhood of an hour to run from Putnam to Baird.

Plaintiff introduced in evidence a diagram of the tracks of the Texas & Pacific Ry. Co., at Cisco, which was explained by the witness.

If the "Ys" were full of cars it would take from an hour to an hour and a half to change the engine and place it on the front end of the train. Mr. Dashiel was in the service of the company something like eight or ten months; so far as I know, up to the time of the accident, he discharged his duties carefully, and was a sober man; if he had not been he would not have remained in the service; I stated that he re-entered the service on the 3rd day of January; I keep these train sheets on file in my office; they are compiled in the office of the train dispatchers. Mr. Dashiel was promoted from brakeman to conductor; he was considered a good, competent railroad man; he was promoted over some others. At the time and place of the collision defendant had a rule or regulation that one freight train should not follow another train at a closer space in time than five minutes.

Re-direct examination:

Mr. Dashiel was on the road fifteen days in January; an engine can be placed on the front end of a train by making what is called a

flying switch, but that is positively prohibited on account of the great element of danger; I do not know the condition of the "Y" at Cisco.

Defendant offered in evidence the application of Mr. Dashiel to the Texas & Pacific Ry. Co., dated October 24, 1900, for employment.

Defendant offered in evidence application made by plaintiff to the Chicago, Rock Island & Texas Ry. Co., dated August 13, 1901. Also the medical report of the company's physician.

Defendant offered in evidence the application made by plaintiff to the El Paso & Northeastern Ry. Co., dated April 30, 1902.

79 Dr. BACON SAUNDERS, a witness for defendant, testified as follows:

I am a practicing physician and surgeon, and have been for 26 years; I am a graduate of the University of Louisville; took a post graduate course at John- Hopkins, and in New York; I am dean of the medical college at Ft. Worth, and professor of surgery; have held that chair for nine years; my firm are physicians and surgeons for the Texas & Pacific railway, at this place; as such, it is our duty to look after the injuries of the employés of that road; there is a system by which they pay so much for hospital fees; a small amount is deducted from their salaries each month, according to the amount of salary they receive; when they are injured in the service of the company, they are entitled to treatment free; there is a hospital at Marshall; patients are not required to go there where they have a family and prefer to stay at their residence, and they are given the services of the local surgeon at that point free, as long as they need it; it is not limited, so far as I know; I was called on to treat Mr. Dashiel, the plaintiff in this case; I think it was in the afternoon of the next day on which he was hurt, but I am not sure; he was at his home on South Calhoun street, between Railroad avenue and Daggett; I examined him; I ascertained that he had been injured and bruised up; I don't know that I can recall all of the injuries; I found him suffering from slight injuries on the scalp, and various bruises on the body; I made a report of it at the time, and sent it in; I find this report is in my personal handwriting; I filled it out myself; I made it in duplicate, and retained one copy in my record; I have referred to it, and refreshed my memory; I found he had a wound on the scalp, and that he had various bruises about his body, none of a very serious nature; I cannot recollect, without refreshing myself, about the various bruises, they are a matter of record; I find in my prognosis that I say "will soon be well;" I took the dressing off of the wound on his scalp, and re-dressed it; I applied a new bandage and re-dressed it; I don't recollect whether it was sewed up or not, I didn't pull it apart, I just applied a new bandage and re-dressed it; whether it had been sewed together or brought together with some adhesive strip, I don't remember; my impression is it was sewn together, though I can't be

positive; I visited him twice, and he was at my office three times; he came to my office on the 8th of January; I visited him on the 25th and 26th of December, and on the 8th of January following he was in my office, and also the 11th and 12th; when I first went to see him and examined him, I saw nothing to indicate that
80 there was any brain trouble; his condition was practically normal; he was complaining of a general soreness, bruises and sprains; as I remember, he complained more of his back and one or the other of his legs or thighs, but there was no symptoms to indicate any serious brain trouble; he had no fever, and his pulse was normal, and all his other symptoms normal; he was perfectly rational; he gave a detailed account of the accident, and was perfectly at himself; he was laying on a couch, and got up and sat up for me to re-dress his head, and told me about the details of the accident, and spoke about how fortunate he was; when he came to my office on these dates in January he was all right, that is, he was rational; I have no remembrance of anything abnormal; if the injury had been sufficient to produce injury to the brain, and cause him to be flighty, or any condition that was abnormal, I think I would have discovered it; if he had an injury or a blow on the head, a surgeon always looks out for an injury; a blow on the head would not hurt any more than on the knee, or any other part, unless it injured the brain; the skull is a round box, and consists of two layers of bone; we call one the inner and the other the outer table; between these two layers is a soft spongy structure; this soft substance will protect and prevent a fracture of the inner table; it acts as a kind of bumper, the outer table can be injured, and not injured the inner table; some parts of the skull are close together that is, the two tables, and in some places they are separated quite a distance; on the inside of this skull is the brain; there is a space between the skull and the brain; this space is filled with fluid, that is, between the skull and the brain; it is in there the brain fluid circulates all through the brain and down the spinal cord; if there is a blow sufficient to make a depression on the brain, the brain will be injured; the blow must be sufficient to tear the membrane around the brain, and lacerate and give rise to hemorrhage, or it must be so general in its character that it disturbs the whole brain structure; I did not see any symptoms of this kind; I saw nothing to indicate any brain injury; there was certainly no paralysis, and certainly no unconsciousness; I was never called to see him again; after I discharged him, presumably, on the 12th day of January, that is the last I ever heard of the case, until to-day, so far as I know; on examination now I find he has a perfectly normal skull, has only a little bump; I think I feel a little irregularity; the scalp is perfectly movable at that point. (Witness indicates the place where his scalp was injured.) I find another little irregularity that I think is perfectly natural; I don't think I find anything abnormal; if I find it
81 at all, it is at a different point from the place pointed out by the plaintiff; I find nothing, except a little scar in

the scalp, I find nothing abnormal; I find nothing except what would be found in every skull in this room; I cannot say that any one of these inequalities was not due to a slight abnormal depression, unless I had cut down on the bone; I find nothing about that skull, except that slight scar; there is no evidence in the world that his skull had been fractured; I have seen quite a number of fractured skulls; I don't do anything but practice surgery, that is my business; I devote my whole time to it, and am kept very busy, and have done so for practically twenty years; I have treated people all the way from Texas, Indian Territory and New Mexico; if there was a deep-seated indentation on the skull it would appear; there is no question about that; there is no indication of any on his skull; it is perfectly possible and a common occurrence for a small indentation to be on the outside skull and not affect the inner skull; the practical way to find out whether that skull is fractured or not, would be to shave his head and cut down on the bone and examine it; that is not a dangerous operation, but it is painful; if there was pressure on the brain, it might produce paralysis; pressure on the brain is sometimes relieved by trephining; I have examined his pulse and looked into his eyes; his eyes look perfectly normal; his pulse is a little more rapid than normal; that may be due to nervous excitement; his pulse is a little more frequent that I should expect from a man of his size; his pulse is about eighty.

Cross examined.

By the COURT:

It is perfectly possible for a growth to collect and form in the region of the brain presided over by memory, and absolutely blot out everything of his recollection of his previous life, and he may go on and begin to live for that hour; that would not occur from brain pressure or anything on the surface of the brain; the base of the brain is the memory part, back behind the ear; I cannot tell how soon a tumor would occur as the result of a blow; in the first place, the only kind of tumor I can understand as liable to be produced on the inside is by pressure on the brain; we are getting into very deep water; the blood clot would not blot *not* memory, unless it clotted in the memory center; there are certain parts of the brain, certain functions of the brain, if it is injured, you cannot speak a word; another part will destroy memory; you could see the
82 immediate effect of such an injury as that; it would result within the first few hours, or within the next few days; I saw no indication of that from my examination. The symptoms accompanying an osceous tumor or lymph formation in the head or brain are very violent headaches and intense pains in the brain.

W. R. SCOTT, a witness for defendant, testified as follows:

My name is W. R. Scott, I am general superintendent of the Ft. Worth & Denver City railroad; I have been in the railroad busi-

ness about 23 years; I have acted in the capacity of locomotive fireman, locomotive engineer, traveling engineer, train master, superintendent and general superintendent; I have been in the mechanical and operating departments of the road; I am familiar with the duties of conductors with reference to protecting their trains; all train men, conductors and engineers, are expected to protect their trains, under all circumstances, that being the paramount thing; he should see that the train is flagged in case his train is stopped or slowed down, especially as he is liable to be overtaken by a train following; if a train is running at night between stations, and another train is following, it would be the duty of the conductor to send a brakeman or flagman back to warn the approaching train when he stops or slows down; he should do it himself, or see that it is done; at night a red lantern is used to flag with; I am familiar with air brakes and the Westinghouse rules; the rules governing the application of brakes provide that conductors and train men shall not apply the air from the angle-cock, unless it is an emergency, because the engineer is in charge, and when the air is applied in that way he would suspicion that the train had parted or the air hose ruptured; if he gets a signal to go ahead in such a case as that, it indicates that the train is all right.

Cross examination:

I am superintendent of the Ft. Worth & Denver; I have no rule on the Ft. Worth & Denver that trains shall not be run backwards in the night time with the engine pushing the cars instead of in front; good judgment would say that it was better to operate an engine in front of the cars than to push them, because the engineer has control and manipulates the brakes; if it can be done it ought to be; Thompson and Spoonts are also attorneys for the Ft. Worth & Denver; a train running at the rate of seven to ten miles an hour on up-grade, and the emergency air was applied, it would
83 depend entirely on the condition of the appliances as to what distance it would require to stop the train; it would depend on the grade; of course the grade is an important factor in resistance; a grade of two or three feet to the mile is practically level; if a train running eight or ten miles an hour, with three or four cars and a caboose, and the brakes on the engine and cars are all in good working order, and the emergency air is applied in full force, it is possible that the train could be stopped in 100 or 125 feet.

Re-direct examination:

In order to make that stop, everything would have to be ready; first, the signal has to be given; and then the men have to act, and then the appliances on the car; all that takes a little time; it would depend on how quick the men move; work trains ordinarily run ahead one way and back the other; going ahead the engineer looks

after the head end, and in backing up the conductor and train men virtually take his place by being on the back end of the train and signal to him in event of danger;

I don't think there is a great deal of difference in the safety of a train, running with the engine backwards and the tank in front and the cars behind, or to run the engine on the rear end of the train with the caboose in front and the conductor in the cupola of the caboose; any one is liable to make mistakes; the engineer is on one end and looks out for obstructions, and the conductor is relieved of the responsibility, but on the other hand the engineer looks out and the conductor also; the conductor to discern, if possible, any element of danger, and the engineer to receive signals from the conductor.

F. T. SCOTT, a witness for defendant, testified as follows:

My name is F. T. Scott; I live in Ft. Worth; I am in the grocery and butcher business, and have been for nine years; I am not related to the Scott who was just on the stand; I have seen Geo. H. Dashiel, and know him; I first become acquainted with him about two or three years ago; when I first knew him he was living with his brother; it was after he is said to have been hurt, I presume; his brother opened an account with me, and of course he was at the store frequently, and oftentimes got something in the grocery line; his brother run an account for possibly a year and a half; some time after his brother opened an account, the plaintiff himself
84 opened an account with me; I can't say just when that was; it was when he went to work for the Rock Island; he traded with me two or three months, may be more; I cannot say how often he would be at the store, possibly every day; that was before he opened the account; after he opened an account with me I did not see him so often, because he was on the road; he would come in sometimes and get a cigar; I don't know of his getting any groceries after he went to work; I didn't know him before he was said to have been hurt; as to his being rational, I may not be a very good judge, but it seems to me he is about the same as the rest of us; in his conversation and action I saw nothing to indicate that he was different from anybody else; I had no occasion to think anything of the kind; he could tell what he wanted; there was no difference in him and other men that I could see; I saw nothing to indicate that he was flighty; he seemed to talk intelligenty; I have never seen him since he came back; they were living in about three blocks of me.

Cross examination:

I never heard him complain of his head hurting him; I have seen him in the courtroom here; I can't say that I can see any difference in him now; if I saw him like I saw him then he might look different; I never knew him to be drunk or under the influence of whiskey in my presence.

J. L. CHEEK, testified in rebuttal:

When an engine is pointed one way and is pushing or backing a train pointed in the opposite direction, and the train comes to a place where there is a switch or side track, then it is not at all necessary to make a "flying switch" with the engine or any of the cars being so pushed, in order to get your engine in front of and pulling instead of pushing the cars. When you reach such a side track, push the cars in on the same, then pull your engine back on the main line, close the switch and pull engine down the main line and back it in on other end of switch, couple it on to your cars, and then, with engine thus in front, back on to the main line. Another way to get your engine in front is just push your cars past the switch down the main line; uncouple engine and take it in on switch and down through the switch and on to main line at other end of switch, move your engine up main line and couple on to your cars and pull out down main line with engine in
85 front of cars. There is still another way to put your engine in front of cars, but these two will serve to illustrate (and the witness draws a diagram and illustrates to the jury). Any railroad man with any experience or capacity would not be forced to make a "flying switch" to situate his engine and cars as I have above described.

Plaintiff further introduced in rebuttal defendant's admission in open court that J. Y. Burke, was at time of the collision the division roadmaster of defendant, and as such that he had authority to order Dashiell to carry on his train the section foreman who was let off by him, as hereinbefore testified. That on the day of the collision said Burke did order Dashiell to carry on his train said section foreman from Delmar, west of Cisco, to the Eastland section house. That said order was so given by Burke personally at Delmar, and that said Burke rode on the work or colliding train from Delmar to the place of collision, and was himself injured in the collision.

It was also admitted by defendant in open court that it was proven by said Burke that at the time and place of the collision that defendant company had in force and operation a rule or regulation that one freight train should not follow another freight train at a closer space in time than (5) minutes.

Plaintiff further introduced in rebuttal, defendant's time table rule No. 2, as follows:

"Rule of conductors, engineers, and trainmen. All trains will be run under the direction of the conductors, except where their directions conflict with rules, or involve risk, in which case the engineer will be held equally responsible."

WILLIAM CHILDRESS, a witness for the plaintiff, testified in rebuttal, as follows:

My name is William Childress, and am employed by defendant. I was on the rear train when the collision occurred; I had never

been over the road as brakeman before; that was my first trip east; I made the trip west, going out, and was returning. I was not acquainted with the road there nothing more than I had learned on one trip. I wore eye glasses that night; I was acting as brakeman; my regular position was braking ahead; Mr. Petrie was also brakeman on that train. I reckon I was filling his position at the time of the accident. When I saw the train in front of us I gave our engineer a signal; I gave him a slow signal and then I proceeded to jump off. I can't say how many signals I gave him; I
86 was on the rear platform of the caboose—platform of the caboose next to the moving train. Our train was equipped with air; it was down at the end of the car—that is, the air appliances; it was about six inches from where I was standing and accessible to me; the air was connected with the engine. I can't say whether I gave the engineer a slow signal or a stop signal; there was no air applied; if there was I didn't feel it; I did not apply it myself. If the engineer had applied the air the result would have been the train would have slowed down or stopped. At the time of the collision we were running about fifteen miles an hour. I had been on the work train for some time as brakeman. I wore glasses at times for the protection of my eyes—altogether for that purpose. I had seen the train in front of us at several different places before the accident; I can't tell how far I had seen it before the collision; I was something like a quarter of a mile from the train when I gave the signal to the engineer; I didn't give very many signals; you take a train running fifteen miles an hour and the other one only a quarter of a mile away, that would only give me one minute. I gave a signal and I saw the train didn't slow up; I would not have time to do anything in a minute; the air goes on immediately, but it doesn't stop the train immediately.

Cross examined:

I saw the forward train several times. A man on the rear end of the caboose of the forward train could see our train approaching. They were aware of the fact that our caboose was in front. It was some little time after I first saw the train in front of us before I gave the signal. I didn't begin to give the signals after we left Eastland as soon as I saw the lights; we run on for some distance. It is very hard to locate the distance a train is ahead of you at night; I know about where the section house is; the train was a little east of the section house when I first observed it. If I had been flagging when I first saw the train after leaving Eastland, I would have had time to stop the train by applying the air before reaching the car. If I had seen a flag it would have indicated danger—that they were about to stop or would not make their time; it would indicate that I would have to stop our train; if they had waived a lantern across the track, that would indicate danger, that they wanted us to stop; I did not receive such warning; if I had received it I would have made an effort to stop the train sooner than I did.

My eye-sight is good; I passed a physical examination this
87 fall. It was just as good the night of the accident; glasses do not interfere with my eye-sight.

Defendant offered in evidence a certain release executed by the plaintiff, George H. Dashiel, which said release was printed, except the part marked in italics, which was typewritten, and save and except the dates and the signature of George H. Dashiel, and one of the witnesses, which was in ink. Said release was as follows:

"Whereas, on and prior to the 24th of December, 1900, I, G. H. Dashiel, was employed by the Texas & Pacific Railway Co. as brakeman and extra freight conductor at or near Eastland, Texas, on the said 24th day of December, 1900, about 3:15 o'clock a. m. I sustained certain personal injuries, in the manner and of the character described, to the best of my knowledge and ability, to-wit: extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm and giving me scalp wound.

"And whereas, it is by said railway company and myself mutually desirable to maintain amicable and pleasant relations and avoid all controversy in respect to said matter.

"Now, therefore, to that end, and in consideration of thirty and no/100 dollars to me now here paid in cash by said Texas & Pacific Railway Company, I hereby *reasle* [release] and acquit, and by these presents bind myself to indemnify and forever hold harmless said Texas & Pacific Railway Company from and against all claims, demands, damages and liabilities of any and every kind or character whatsoever, for or on account of the injuries and damages sustained by me in the answer or upon the occasion aforesaid, and arising or accruing, or hereafter arising or accruing, in any way therefrom.

"It is expressly understood that, although we remain as free to contract with each other as if this transaction had not occurred, the Texas & Pacific Railway Company has not and does not agee to bind itself to employ me at or for any time, or in any capacity whatsoever.

"And it is also expressly understood, that all promises and agreements respecting or in anywise relating to the subject hereof, are fully expressed herein and no others are made or exist.

"Signed in duplicate this 2d day of Feb'y, 1901.

(Signed) G. H. DASHIEL.

Witnesses:
J. A. HILLIS.
J. H. YOUNG."

88 All the words in the above described instrument, except the date and the signature and except the words "bruising my body, right leg, right arm and giving me a scalp wound," were in print in a form already prepared before the execution of the re-

lease. Said words "bruising my body, right leg, right arm and giving me a scalp wound," were typewritten and incorporated into the first half, or clause of said release when the same was signed and executed by G. H. Dashiell.

When said contract of release was in evidence the court said: "The release will obtain as to the particular matters, or injuries, set up specifically in the first part of it. There will be no recovery for any injuries which are specifically set out in the release, because that release has not been set aside. Only those matters, or injuries, will be submitted to the jury which are not incorporated in the release."

To which ruling and action of the court the defendant then and there in open court excepted, and thereupon the release was read in evidence to the jury.

Defendant put in evidence a letter which had been identified by the witness J. W. Ward, as having been received by him from the plaintiff Dashiell, and in Dashiell's handwriting, which was as follows:

Ft. Worth, Jan. 15, 1901.

Mr. J. M. Ward, supt. T. & P. R. R.

Dear Sir: Please find enclosed my doctor bill from Doctor Frost, of Ranger; if I am not mistaken you told me to send it to you. Mr. Ward, I was off 11 days and thought I was able to work; went out one trip but could not stand it; my back and shoulder played out on me and I had to go to bed and send for Doctor Saunders. I am afraid I was hurt worse than I thought at—I am in bad shape yet and don't think I ever will be as good a man as I was before I was hurt, but hope I will get all right and will be able to stay at work as I am in debt here quite a little on account of sickness of my family and myself. I was off 21 days altogether. Anything in the way of pay for same will be appreciated by me.

(Signed) G. H. DASHIELL."

89 The Texas & Pacific Railway Company.

Application for Situation as Brakeman or Conductor.

I, G. H. Dashiell, apply to the Texas & Pacific Railway Company for a situation as brakeman, having written my answers to the following questions making such answers a part of my application.

1. My name in full is George H. Dashiell.
2. My age is 30 years.
3. Nationality, American.
4. My height is 5 feet 7 inches; color of eyes, gray; color of hair dark.
5. Was born in Illinois.
6. Am (married-single) married.
7. My family consists of wife and 2 children, who reside at No.

113 South Calhoun street, Ft. Worth (town), Tarrant county, Texas State.

8. My mother is living, and reside- at No. 113 South Rush street, Ft. Worth, town, Tarrant county, Texas State.

My father's name is—dead.

9. I have had experience in railroading as set forth below: Name of railroad, C. C. C. & St. L.; town or city where employed, Mattoon; name of State, Illinois; name of superintendent, Barrum; my occupation was, brakeman; entered their service, 1881; left their service, 1890.

Name of railroad, U. P. R. R.; town or city where employed, K. City; name of State, Mo.; name of superintendent, Palmer; my occupation was, conductor; entered their service, 1891; left their service, 1892.

Name of railroad, M. K. & T.; town or city where employed, Denison; name of State, Texas; name of superintendent, Bethord; my occupation was, conductor; entered their service, 1894; left their service, 1897.

Name of railroad, I. & G. N.; town or city where employed, Palestine; name of State, Texas; name of superintendent, T. C. Rady; my occupation was, brakeman; entered their service, 1897; left their service, 1899.

10. Was last employed by I. & G. N. R. R., and left their employ on account of sound in body and limb.

11. State whether or not you are in any way unsound or deformed in body or limb, and if so, describe defect——

12. My hearing is good, and eyesight good, and (am or am not) am able to distinguish colors.

13. Do you use intoxicating liquors, and if so, to what extent? I do not drink.

90 14. Do you understand that it is contrary to the company's rule to drink while on duty, or to frequent places where intoxicating liquors are sold? I do.

15. Of what orders or organizations are you a member? None at present.

16. You are hereby informed that this company does not block frogs and guard rails. Do you assume the risks incident to this state of facts? I do.

17. Do you make this application for employment in train service, realizing the hazardous nature of such employment, understanding that it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, track scale boxes, water tanks, coal houses, platforms, sheds, roofs, and other overhead and side structures, and that in the performance of the duties for which you are employed you are liable to receive injuries by being knocked off the side or top of cars, unless you use due care to avoid injury thereby? I do.

18. Do you agree to acquaint yourself with the location of all

overhead and truss bridges, as well as the location of all other structures along the line of the road? I do.

19. Do you understand also that this company does construct and maintain cattle guards, within or near by switch limits, over which cattle guards it is necessary to frequently switch trains, and that in the performance of the duties for which you are employed you are liable to receive injuries unless you use due care to avoid injury thereby? I do.

20. Have you been in the employ of this company before? If so, state on what division, in what capacity, and cause of leaving. I have never — by this company before.

21. Do you understand that this company does not have all its main tracks and side tracks ballasted or surfaced, and that many of the side tracks being laid with old iron, are liable to have slivers on the rails, and that there are cattle guards and uncovered drains on the main tracks and side tracks? And do you agree to particularly advise yourself thereof? I do.

22. Do you understand that no officer or employé of this company is authorized to request or require you to use defective tracks, cars, machinery or appliances of any kind, and that when you do so you assume all risk of injury therefrom? I do.

23. Do you understand that this company desires to employ only experienced men in the service, and does not undertake to educate inexperienced men? I do.

24. Do you agree to rely on your co-employés and not on
91 the company for information as to any and all things, including the character of any kind of machinery and appliances, which would render your work dangerous, or subject you to injury, or which may be necessary to the proper performance of your duties? ——

25. Do you acknowledge having been furnished with copy of current time table containing the rules and regulations for the government of the employés of this company, and do you agree to read said rules and be governed thereby? I do.

26. It is understood by me that if I am put to work temporarily pending the investigation, and my application is not approved, that I agree to withdraw from the services of the company without complaint.

I, G. H. Dashiell, do hereby acknowledge having read the above questions, and that I have written the answers thereto with my own hand.

In witness whereof, I hereby set my signature, this the 24 day of October, 1900.

G. H. DASHIELL.

Address: Ft. Worth, Texas.

Witnessed by
(Signed) J. A. HILLIS.

FOOT NOTE.—Applicant must sign his full name, and not use initials, and all writing must be in copying ink.

(Indorsed:) 252. Form 736. No. —. Texas & Pacific Railway Co. —— div. Application of G. H. Dashiell for position as brakeman. Dated M'ch 25th, 1900. Date approved. This application, after being filled out and approved, is to be filed in the office of the division superintendent, division master mechanic or other head of department in which applicant is employed. No letters. Discharged Ap'l 1st, 1901. a/c drunk on duty. Letter issued July 17th, 1901. Page 193.

Form 1063.

Chicago, Rock Island & Pacific railway.

Application for Employment.

Ft. Worth Station, Aug. 13, 1901.

All applications for employment as agents, operators, station baggagemen, enginemen, firemen, engine dispatchers, conductors, brakemen, train flagmen, train porters, train baggagemen, yard foremen, switchmen, switch tenders, signalmen and such other employés as may be designated from time to time, must be made by the applicant himself, in duplicate, on this blank, who will then report to the designated company's surgeon to have his sight and hearing tested, and when the position applied for is in the engine,
92 train or switching service, for a physical examination also.

The surgeon making such tests or examinations will report the same in the proper place on this blank, sending one to the division superintendent or master mechanic, and the other to the surgeon-in-chief.

No one need apply for employment who is not able to read and write English, and cannot produce a good character from his last employer.

Testimonials are only accepted from respectable and well known persons, and in all cases their names, occupations and addresses must be given.

All persons engaging in the service of this company in a capacity in any way connected with the transportation department, are hereby instructed and notified that they must not enter upon their duties until they have first read and fully understand all the general rules and regulations in the book of rules and regulations, operating department, and the special rules attached to the current time table.

To —— ——:

1. My name in full is G. H. Dashiell.
2. When born? Oct. 23, 1869. Where born? Kankakee, Ill.
3. Name of wife if living, Mary Dashiell. Residence 412 Ryan St., Ft. Worth, Texas. (City, street and number.)
4. Name of mother, if living, Mary Dashiell, residence 1106 East Railroad Ave., Ft. Worth. (City, street and number.)

5. If unmarried and parents not living, name and address of nearest relative.

6. Names and addresses of any persons dependent upon you for support, or to whose support you are contributing. Wife and two children, Ft. Worth, Texas.

7. Where and how long have you attended school? 10 or 12 years at Mattoon, Illinois.

8. Do you smoke cigarettes? No.

9. Occupation previous to engaging in railway service. School.

10. State what railroad experience you have had, giving names of roads, in what capacity employed, length of service on each road. If you have not previously been employed by a railroad company, state by whom and when and where you were employed. (Applicant must here give his history for the last five years, beginning with his position of five years ago, and giving each year in regular order down to date.)

98 Name of railroad or other employer, M. K. & T. R. R.
Town or city at which employed, Denison.
Name of State, Tex.
Name and present address of employer. C. L. Harris.
What is your occupation. Conductor.
Date you entered the service. July, 1895.
Date you left the service. Sept. 1897.
Name of railroad or other employer. I. & G. N.
Town or city at which employed. Palestine.
Name of State. Tex.
Name and present address of employer. R. Eady.
What was your occupation. Brakeman.
Date you entered their service. Sept. '97.
Date you left their service. May '99.
Name of railroad or other employer. U. S. Army, Co. 2, 1st U. S. V.
Name and present address of employer. Capt Allen.
What was your occupation. Serg't.
Date you entered their service. May, 1898.
Date you left their service. Mar. 1899.
Name of railroad or other employer. T. & P. R. R.
Town or city at which employed. Ft. Worth.
Name and present address of employer. J. W. Ward.
What was your occupation. Conductor.
Date you entered their service. March, 1900.
Date you left their service. April, 1901.

I had leave of absence from the I. & G. N. on account of going into U. S. Army.

11. Cause of leaving last situation (explain fully). Was employed as brakeman and conductor from March 25th, 1900, to April 1st, 1901. Dismissed for violation of the company's rules. T. & P. R. R. Ft. Worth, Texas. (If you have ever been in the serv-

ice of this company state what length of time, in what capacity, where, when and why you left it.) Never worked for this company.

12. Have you ever been discharged or suspended from any situation? If so, state particulars, when and where. Discharged from the T. & P. for violation of their rules. That is all I know about it. That is the way my letter reads.

13. Have you ever been injured? If so, when, where, how and extent of injury. I never had any bones broken.

14. Have you now or did you ever have any litigation with any railroad company? When and where? No.

94 Names and residences of three responsible persons who will certify to my good character: J. A. Lee, 902, 5th Ave., Ft. Worth; Rev. G. S. Tumlin, 310 St. Louis Ave., Ft. Worth; J. H. Hillis, T. & P. office.

In consideration of my employment by said company, I further agree that whenever I shall sustain any personal injury while in the service of said company I will allow its surgeons and any medical examiners it may select to examine my person and body as often as the company may deem necessary, and I hereby waive all objections to such surgeons or medical examiners testifying whenever called upon by the company, and I further agree that my refusal to allow any such examination to be made or testimony to be given shall be a bar to the institution or prosecution of any action on account of such injuries; and any action pending at the time of such refusal shall at once abate in consequence thereof.

In further consideration of such employment I agree that if, while in the service of such company, I sustain any personal injury for which I shall or may make claim against the company for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to the adjusting agent of said company, at Ft. Worth, and to the general attorney of said company at Topeka; which notice shall state the time, place, manner and cause of my being injured and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly and promptly investigated; and my failure to give written notice of such claim in the manner and within the time aforesaid shall be a bar to the institution of any suit on account of such injuries.

I certify that the foregoing statements are true, and hereby apply for a situation in the service of the Chicago, Rock Island & Texas Railway Company, and, if accepted, agree to pay all of my bills promptly each month, to maintain strict integrity of character, to abstain from the use of intoxicating liquors, to avoid visiting saloons or places where liquor is sold, to familiarize myself with the general and special rules and regulations of the department of service in which I may be employed, to faithfully observe the same, and keep advised of such amendments to said rules

and regulations as may hereafter be made, and to perform my duties to the best of my ability.

(Sign here) G. H. DASHIELL, Applicant.

My present address is 412 Ryan St., Ft. Worth.

Witness:

——, ——.

95 Applicant approved for employment as —— —— 190.

——, ——.

NOTE.—This application must be filled out by applicant in his presence of and witnessed by the head of the department (or his deputy) in which the applicant is to be employed.

Defendant put in evidence the application for employment which had been made to the Chicago, Rock Island & Texas Ry. Company, and which was identified by the witness, G. V. Morton, and which was as follows:

Surgeon's certificate of examination, of G. H. Dashiell. Occupation conductor. Age 32.

Vision.—Right eye—J $\frac{20}{20}$ @ to 20. Left eye—J $\frac{20}{20}$ @ to 20.

Combined—$\frac{20}{20}$

Color sense.—For red, normal. For green, normal.

Hearing.—Right ear, watch,—$\frac{60}{60}$, whisper,—$\frac{20}{20}$. Left ear, watch, —$\frac{60}{60}$, whisper,—$\frac{20}{20}$.

What is the rate of pulse. 80. Of respiration. 17.

Name.— Date.—

What diseases has he suffered from? None.

Has he ever suffered from hernia? No. What form?—— Its present condition?——

Has he ever suffered from injury? No. If so, what and when?——

Is he the subject of any deformity, from injury or otherwise? No. If so, note here and locate on skeleton blank herewith——.

Has he any present source of disability in heart, no; lungs, no; kidneys, no; joints, no; veins, no; feet and legs, no; hands and arms, no; spine, no; urinary organs, no. (Applicants should be stripped for this examination. Note with care varicose veins, enlarged joints and anything tending to produce or prolong disability.)

Does he use intoxicating liquors? No. Is his appearance
96 that of a temperate man? Yes. Does he smoke cigarettes? No. Has he had small pox, yes.; or been recently vaccinated? 1 yr. ago. His height is — feet — inches; weight — lbs.; color of eyes — of hair —. He is physically a first-class subject for position as conductor.

(Signature) W. A. DURINGER, Surgeon.

Examined at Ft. Worth. Date Aug. 13, 1901.
Signature of applicant to be taken at surgeon's office.

(Sign here) G. H. DASHIELL, Applicant.

Remarks: (Anything lacking in spaces above should be added here.)—
See instructions and standards for sight and hearing examination and skeleton blank, next page.

[Indorsed:] 373. Application for employment. Name G. H. Dashiell For position of brakeman. Approved — — 190–. Remarks.—

Instructions and standards for sight and hearing examinations.

1. All examinations shall be conducted in private.

2. The standard of satisfactory vision shall be $\frac{20}{20}$.

The above standard is for "combined" vision, and providing that neither eye has V of less than $\frac{20}{70}$, which must be reached without glasses. For near vision J 2 must be read at 10 to

3. The color sense must be perfect for red and green.

4. Hearing must not be less than $\frac{40}{60}$ for the watch, and $\frac{16}{20}$ for the whisper. (A watch with a range of 60 inches is recommended, and a loud whisper should be heard at 20 feet.)

5. In the examiner's blanks any defects should be noted under the head of "remarks" and each case pronounced "fit" or "unfit" for duty, positively, except where defect may be due to acute disease, when the blank may be indorsed "unfit" for a specified time, and a future examination made.

97 Defendant put in evidence the letter or statement which had been identified by the witness, J. W. Ward, which was as follows:

"The Texas & Pacific Railway Co.
"Special and accident report.

"For — train No. "Extra," 255 left 369 for 253 at 2:00 a. m., on Dec. 24, 1900.

"Statement:

"Car wrecked.

"Number Initial

"2111 T. & P. caboose.

"Mr. J. W. Ward, supt. T. & P. R. R., Big Springs:

"Two extras east eng. 255 and 189 was coming east; we both had same orders; both let No. 6 pass at Lem; met two trains at Eastland; did not stop extra 255, slowed up ½ mile east of section house to let foreman off but did not stop; we had gone about ½ mile or more from where foreman got off when extra 189 run into rear of our train, wrecking our caboose and hurting brakeman Berry and myself. I was on rear platform of my caboose when foreman got off; gave engineer signal all right, and he kept on going and answered my signal. I went inside caboose, sat down by stove with face to rear of car; looked at time car to see how far we could go for No. 5, when they struck us—we was running 10 or 12 miles per hour on straight track up-grade; we had four red lights on rear of our caboose, all burning good. I had 15 mty. box cars, and 8 lds.

"(Signed) G. H. DASHIELL.

"Accident occurred at 3:15 a. m., 12/24/1900.

Defendant offered in evidence the application for employment made to the El Paso & Northeastern railway, which had been identified by Doctor Fitzgerald, as follows:

(Copy.)

Form H 60-1M-2-02.

Personal record.

This record will be filled up and signed by the following classes of employés:

1st. All in engine, train and station service.

2nd. All occupying clerical positions in any dept. of the Co.

3rd. Heads of depts. and others having authority over other employés.

4th. Personal records to be forwarded to heads of departments for file. Those heads of department to be forwarded to assistant general manager for file.

98

1. Name in full (no initials)? George Harry Dashiel.
2. Age? 38.
3. Married or single? Married.
4. Residence of wife? Ft. Worth Tex.

5. Town where born? Kankakee. County? Kankakee. State? Ill.

7. Name of parents if living? Mary J. Dashiel. Residence? Ft. Worth, Tex.

7. Name and degree of nearest relative, if parents are dead? —— Residence? ——

8. How many years' experience in railway business? 15 years.

9. Ever injured, if so, on what road and extent of injury? No.

10. In what business before entering railway service? School.

11. All roads on which previously employed. In what capacity, length of service and cause of leaving:

Railroad—C. Q. T. & C. Station or div.—Matton, Ill. Capacity—bkman and cond'r. During what time—from 1886 to 1891, 5 yrs. Cause of leaving—own accord.

Railroad—U. P. Station or div.—Kans. City. Capacity—cond'r. During what time—from 1891 to 1894, 3 yrs. Cause of leaving—discharged.

Railroad—M. K. & T. Station or div.—Denison, Texas. Capacity— ——. During what time—from 1894 to 1897, 3 yrs. Cause of leaving—own accord.

Railroad—U. S. army. Station or div.—Sp war. Capacity——— During what time—from 1898 to 1899, 1 yr. Cause of leaving—discharged.

Railroad—T. & P. Station or div.—Fort Worth. Capacity—cond'r. During what time—from 1899 to 1902, 3 yrs. Cause of leaving—suspended.

12. Number of etters of recommendation enclosed? None.

13. Reference (names and addressed)? A. D. Bellard, supt. Denison, Tex., M. K. & T. J. W. Ward, Big Springs, Texas.

14. Date commenced service for this company? April 30, 1902.

15. Present occupation? Brakeman. Present location? Almagorda. Date, April 30.

(Signature) G. H. DASHIEL.

99 The application of which the foregoing is a copy is printed, except the parts in italic, which was in ink or indelible pencil, and in the handwriting of G. H. Dashiel.

Defendant put in evidence checks which has [have] been paid to George H. Dashiell on account of wages while in the employ of the Texas & Pacific Railway Company, which checks showed that he had been paid as follows:

March, 1900, freight brakeman, $7.10.
April, 1900, freight brakeman, $49.90.
May, 1900, freight brakeman, $51.90.
June, 1900, freight brakeman, $56.90.
July, 1900, freight brakeman, $68.30.
August, 1900, freight brakeman (not on rolls).

September, 1900, freight brakeman, $19.35.
October, 1900, freight brakeman, $18.30.
November, 1900, pass. brakeman, $5.50.
November, 1900, freight brakeman, $42.65.
December, 1900, freight brakeman, $27.25.
December, 1900, freight conductor, $52.20.
February, 1901, freight conductor, $117.05.
March, 1901, freight conductor, $118.70.

Statement with reference to what he had been paid for January was not put in evidence, as counsel had agreed upon the amount and time as to the others, and agreed to leave the amount paid for January services to be determined according to the testimony of the witnesses.

The defendant offered in evidence the time cars and rules of the company which were shown to have been in existence at the time of the accident, and offered specially rule 13 and rule 14, which are as follows:

13. No train must be stopped on the main track, except the regular stops of the passenger trains, without a flagman being sent back at once. With freight train the rear brakeman must not be permitted to wait until the train comes to a stop before he gets off and starts back.

Under no circumstances will conductors allow their brakeman to deviate from this rule.

14. All trains must be run under the supposition that an irregular train is liable at any moment to overtake them on any part of the road.

190 The above and foregoing being a statement of all the facts in evidence, defendant, before the jury retired under charge of the court, requested the court to give the following instructions:

1. In this case, under the law and the evidence, the jury will return a verdict for the defendant.

2. The jury are instructed that under the rules and regulations of the defendant company, it was the duty of Dashiell to so manage his train when he caused the same to slow down for the purpose of letting a section man off, so as to advise the train following him of that fact, either by a slow signal given from the rear of his train, or sending a flagman back with a lantern, or the use of some method which would advise the operatives of the rear train that his train was lessening its speed, and his failure to do so was negligence, and if they find that had he used such precautions, those operating the rear train would have seen same in time to have checked the speed of their train and have avoided the accident, then the plaintiff cannot recover, and your verdict will be for the defendant.

3. If the jury believe from the evidence that a reasonably prudent person in the exercise of ordinary care, and having charge of the front train as conductor, knowing his train would have to be slowed down for the purpose of allowing a section foreman to get off, would have given some proper warning to a train, which was or might be

following him, of that fact, and if they find that the exercise of such care would have caused those on the train following him to have so checked or lessened the speed of their trains as to have avoided the accident, then in such event Dashiell was guilty of negligence, and your verdict will be for defendant, even though the operatives of the rear train were guilty of negligence in the manner in which the train was operated. (Which said charge was requested in event charge No. 2 above was refused.)

5. If you find from the evidence that Dashiell had advised Shea, conductor on the rear train, that he was going to put off a man at the section house east of Eastland, and you find that Shea with this knowledge, approached said section house, expecting to find Dashiell's train stopped or slowed down at that point, and if you find that at the time Shea's train came in sight of the section house Dashiell's train had passed same and no signal or warning was given to those on the rear train of the fact that his train was going to stop or slow down east of said section house, then you will take such facts into consideration in determining the question as to the degree of care which ought to have been exercised by those operating the
101 rear train and also the degree of care which should have been exercised by Dashiell.

6. Although you may find that the manner in which the rear train was operated, to-wit: with the engine headed west and the caboose and other cars east of same, was more dangerous than had said engine been in front and headed east, yet if you find that Dashiell knew of this fact, then the court instructs you that said Dashiell assumed the risk of danger incident to the manner in which the train was operated. That is to say, he assumed the risk of danger which arose from the manner in which the train was operated so far as such risk of danger pertained to the fact that the train was running headed west with the caboose and other cars in front, and he cannot recover by reason of any liability for such negligence on the part of the defendant company, if any there was.

8. If a preponderance of the evidence does not establish the fact that the plaintiff's injuries are of a permanent nature, then you will disallow any claim therefor.

10. It was the duty of the plaintiff to observe and be governed by the rules of the defendant in existence at the time of the accident on December 24th, 1900, and to also use such care for his own safety, and the safety of his train, as a reasonably prudent man would have used under the same circumstances, and if his injury would not have been received but for his failure to observe such rules, or if he had not failed to use the care and caution which a reasonably prudent man would have used under the same circumstances, if he did so fail, he would not have been injured, then and in either of said events he cannot recover in this suit.

11. If the plaintiff had slowed up his train to let the section man off without flagging the train following and if in so doing he was violating the rules of the defendant company, and if but for said

violation of such rules the accident would not have occurred, then it will be your duty to find for the defendant.

The above and special instructions were separately presented and asked, and the court refused to give same, and the defendant then and there upon such refusal, excepted separately to the action of the court in refusing to give each one of said instructions, and this bill of exceptions was tendered and allowed and signed and sealed by the court; and thereupon the court charged the jury as follows:

At the request of the defendant, the court gave the following charges:

4. In determining the question of the negligence of
102 Dashiell, it is your duty to take into consideration the facts surrounding the situation. You should take into consideration the fact that he knew, or ought to have acted upon the presumption that a train was following or liable to be following him, and the fact that he had caused the speed of his train to be lessened, and the position and place of the train and from all these facts determine whether or not a reasonably prudent person in the exercise of ordinary care would by some proper signal have notified those upon the rear train of this fact. It was the duty of Dashiell to use reasonable care to protect his train, and if he failed in this respect and such failure caused and contributed to the accident, that is to say, but for such failure on his part the accident would not have occurred, then they will find for the defendant, even though there was negligence on the part of those upon the rear train.

7. The duty of the railroad company towards its employés in reference to the running and operating of its trains is that it use ordinary care. Although the jury may find that it would have been safer to run the train with the engine ahead of the cars headed either east or west, yet if they find that the manner in which it was operated was such as a reasonably prudent person in the exercise of ordinary care would have operated it, under all the conditions and circumstances, taking into consideration the rules and regulations of practical railroading, then and in such respect the defendant would not be negligent and no liability would arise therefrom.

9. The jury are instructed that the fact that some kind of settlement was made with Dashiell with reference to his injuries, or a part of same, is not evidence of admission on the part of the defendant that any liability existed, and in so far as determining the liabilities of the defendant, you will exclude that from your consideration and try the case alone upon the law as given by the court and the evidence admitted under its ruling and the same considerations will apply to the fact that Dashiell was not discharged by the company, but retained in its service. These are not matters which you will look to at all, but which you will exclude entirely from your consideration of this case.

And thereupon the court charged the jury as follows:

"The plaintiff, Geo. H. Dashiell, by his next friend, Mrs. Mary J. Dashiell, sues the defendant, The Texas & Pacific R'y Company, for damages alleged to have been sustained by him by reason of personal injuries received on the 24th day of December, 1900, while he was in the service of the defendant company and conductor
103 of a freight train. It is alleged that while he was in charge of a freight train as a conductor, running in an easterly direction on defendant's road in Eastland county, the train of which he was in charge and on which he was riding was run into and collided with by another freight train following his; that said collision was caused by reason of the negligence and carelessness of the defendant and its agents and employés engaged in operating the train which collided with the one of which plaintiff was in charge. It is alleged that the defendant and its employés operating the train which collided with the one on which plaintiff was riding, were guilty of negligence in running the same with the cars in front of the engine, the cars being pushed instead of being pulled by the engine; that the defendant and its employés were also guilty of negligence in not maintaining a sufficient watch or lookout to ascertain the proximity of the train on which he was riding; and further, that the defendant at the time and place of the collision and prior thereto, had enforced for the government and guidance of its employés operating the colliding trains, rules and regulations substantially to the effect that when one freight train follows another it should not do so at a less distance of space and time than five minutes, and that the defendant, its agents and employés, were, at the time of the collision, negligently violating said rules and were operating the colliding train at a much less distance of space and time than five minutes, and that by reason of this negligent disregard of the rules of the company the accident was caused and contributed to. It is charged that by reason of these various acts of negligence the collision was occasioned and plaintiff injured thereby. Plaintiff alleges that since the accident he has been *non compos mentis*, that is, his mind is weak and unsound and that he is incapable mentally of transacting any business and that such is his condition now. He also charges that he was badly burned and bruised about the legs, sides, back, arms, hands and head, and that his left eye has become seriously affected by reason of the injury to his head. He alleges that as a result of the alleged negligence of the defendant and his injury consequent thereon, that he now suffers and will continue to suffer great physical pain and mental anguish. He also alleges his damages.

The defendant, The Texas & Pacific Railway Company, answers the petition of plaintiff and denies each and every allegation contained therein. For special answer it in part says that plaintiff cannot recover in this action for the reason that he was himself guilty of negligence which directly and proximately caused and

contributed to his injuries, and that but for such negligence
104 on his part the accident resulting in his injuries would not have occurred. That the negligence on the part of plaintiff was as follows: That he, while riding upon the freight train of which he was in charge, had full knowledge that another train was following his train. That he directed and knew, or should have known, that his train was to be brought to a standstill, or the speed of the same slackened, in order that a person who was riding upon the same might get off; that he negligently and carelessly failed to send any flagman back to warn the train following, or place any torpedo upon the track, or give any signal or warning to the rear train, or use any precaution whatever, to apprise the rear train that the speed of the train upon which plaintiff was riding would be or had been lessened. That it was the duty of the plaintiff under the circumstances to see that those in charge of the rear train should not approach too near to the train upon which he was riding, and to use all proper signals to accomplish that result. That had plaintiff used reasonable care in this respect, said accident would not have occurred. The defendant further charges that Dashiell and it made and entered into a certain contract of agreement and release, by which it paid Dashiell the sum of $30.00 and for such consideration was released from all liability for damages resulting from said accident and injury.

The plaintiff, by its supplemental petition and answer to the defendant, alleges that the release made by him was for certain of the injuries so suffered but did not include the injury occasioned to his mind, nor the injury occasioned to his left eye by reason of the said accident. That these latter injuries were not in contemplation of the parties at the time the contract of release was entered into, and the defendant's liability therefore is not released by said contract.

Such, gentlemen, constitute the issues made in this case. In support of these issues, evidence has been submitted to you and it is from such evidence and facts and circumstances in evidence that you must render your verdict, being governed by those rules of law which are applicable to the case, and which I shall now give you.

On the question of the release of the defendant from liability for the injury sustained by plaintiff you are charged that the agreement entered into between the plaintiff and the defendant company, which has been introduced in evidence, is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof, to-wit: injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be
a release for the injuries alleged to have been received by him
105 resulting in the impaired mental powers, and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action, and the consideration of which will be submitted to you in this charge.

Upon the issue of negligence of the defendant company the bur-

den of proof is on the plaintiff, and to entitle him to recover he must show by a preponderance, or greater weight, of the evidence, that he received his injuries substantially as alleged, and that they were caused by reason of the negligence of the defendant company.

Negligence, in a general sense, is that omission to perform a duty imposed by law for the protection of one's own person or property or that of another.

Contributory negligence is negligence not only on the part of the one committing the injury, but also upon the part of him upon whom the injury is committed, and by which they both contribute thereto.

Ordinary care is such care as an ordinary prudent man would exercise under similar circumstances. More than this the law does not require; less than this is negligence. You will apply the above definition to the term "negligence," "contributory negligence" and "ordinary care" wherever they are used by me in this charge.

It is in evidence, and uncontroverted, that the train which collided with the train on which the plaintiff was riding and of which he was in charge, was being run with the cars in front of the engine, they being pushed instead of being pulled by the engine.

Now, if you believe from the evidence that the train being operated in the manner above described was also propelled at a high, excessive and dangerous rate of speed, and if you believe that the defendant in operating this said train in this manner and at the rate of speed it was operated, was guilty of negligence, and that by reason of such negligence the plaintiff was injured in the manner alleged and submitted to you, then and in that event, you will find for him, unless you believe that he himself was guilty of negligence which directly and proximately contributed to his injuries.

If you believe from the evidence that the defendant failed to maintain and keep a proper lookout on the train which collided with the one on which the plaintiff was riding, and that in failing to keep such lookout the defendant was guilty of negligence and that by reason of such negligence on the part of the defendant the accident occurred which resulted in the injuries to plaintiff,
106 you will find for him unless you believe that he himself was guilty of negligence which directly and proximately contributed to his injury.

It is charged by the plaintiff that the defendant company had in operation a rule governing and controlling the running of trains, to the effect that when one freight train followed another it should not do so at a less distance of space in time than five minutes. It is in evidence and uncontroverted that such rule was in effect and operative and applied to freight trains on the line of the defendant's railway while running between stations.

If you believe from the evidence that the agents and servants of the defendant in charge of the train which collided with the one on which plaintiff was riding, failed to observe this rule and by reason of such failure were guilty of negligence and that by reason of such negligent conduct the accident occurred, and that the plain-

tiff was injured by reason thereof, then and in that event it will be your duty to find for the plaintiff, unless you should find that he himself was guilty of negligence which directly and proximately contributed to his injuries.

You are charged that it is the duty of any person or corporation engaged in a complex business to establish definite regulations and rules for the protection of its employés. If proper regulations have been established by the company it is relieved from liability for injuries resulting from a violation of the rules by an employé when the injury is the direct and proximate result of such violation, but not otherwise.

That has been introduced in evidence before you — time card rules "No. 14," in effect with the defendant company at the time of the collision for the guidance and control of its employés, which is as follows: "Trains must be run under the supposition that an irregular train is liable at any moment to overtake them on any part of the road."

Evidence has been introduced before you tending to prove that the plaintiff knew that the frreight train of which he was in charge was being followed by a freight or work train. Much evidence has been submitted before you as to the steps which should be taken by a conductor in charge of a freight train to prevent it being run into in event it is stopped or its speed slackened between stations. The evidence introduced bears upon what a conductor should do acting upon the supposition as set forth in the time card rule No. 14, which has been introduced in evidence.

Now, if you believe from the evidence that the plaintiff, Darshiell, failed to send back any flagman to warn the train which was
107 following his train and failed to have any torpedoes put upon the track and failed to give a signal or warning to the rear train or to use any of the precautionary measures testified about to apprise the train following that the speed of the train of which he was in control had been slackened, and if you believe that his failure to take any one, or more, of these precautionary steps was negligence on his part, and if you believe that this negligence on his part directly and proximately contributed to the accident which resulted in his injuries, then and in that event it will be your duty to find for the defendant, even though you should find that it, through its agents and servants, was guilty of negligence in any one or all of the respects referred to in this charge. If you believe from the evidence that the injuries and troubles of which the plaintiff now complains are the result of a failure on his part to take proper care of himself in the use by him of intoxicating liquors, then and in that event it will be your duty to find for the defendant.

If you find upon the whole case in plaintiff's favor, you must then determine the amount of damages you will award him. If you find he should recover, he should be allowed a fair and reasonable compensation for his injuries. In estimating his damages no precise rule can be given, as they are not, in their nature, susceptible of ex-

act valuations. Use good sense and best judgment and be governed by the evidence and give him such sum as will reasonably pay him. In making up this amount you should allow him such sum as will reasonably compensate him for the amounts he has incurred and expended for reasonable medical attention and drug bills, and also, if you find that his injuries are permanent and will disable him in future, you will also allow him such sum as, paid now in advance, will reasonably compensate him for such future disabilities in earning a livelihood.

The burden of proving that the plaintiff was guilty of contributory negligence rests upon the defendant, and unless the defendant has shown to you by a preponderance of the evidence that the plaintiff was guilty of negligence which contributed to his injury, then the defendant would fail on its plea of contributory negligence.

This case with all its facts and circumstances is now before you. It calls for your full and fair consideration. Your verdict, however, whatever it may be, should be based alone upon the testimony presented before you and the rules of law contained in this charge, and you should not be influenced in any degree by a feeling either of sympathy or of prejudice. The law makes you the sole judges of the credibility of the witnesses and of the weight you will accord to the testimony of each.

108 If you find for the plaintiff the form of your verdict will be: 'We, the jury, find for the plaintiff and assess his damages at ——,' stating the amount. If you find for the defendant, you will simply say so."

And to the charge given by the court, the defendant then and there in open court and before the jury had retired excepted for the following reasons:

1. The court erred in its charge to the jury in submitting the issues with reference to the speed of the train and the lookout to be observed and the space of time in which trains should run apart.

2. The court erred in its charge to the jury on the question of the release executed by plaintiff to the defendant in telling the jury that it was a release from liability of the particular injuries which were enumerated in the face thereof, to-wit: injuries to his body, right leg, right arm and a scalp wound, and in the use of the following language: "The court does not, however, construe it to be a release for the injuries alleged to have been received by him resulting in the alleged impaired mental powers and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action, and the consideration of which will be submitted to you in this charge."

3. The court erred in submitting to the jury the question of injuries to plaintiff, for the reason that the plaintiff was barred from recovery for the same by reason of the release.

4. The court erred in not telling the jury that under and by virtue of the terms of the release plaintiff could not recover in this case.

5. It excepted to that paragraph of the court's charge upon contributory negligence, which was as follows:

"The burden of proving that the plaintiff was guilty of contributory negligence rests upon the defendant and unless the defendant has shown to you by a preponderance of the evidence that the plaintiff was guilty of negligence which contributed to his injury, then the defendant has failed on its plea of contributory negligence."

And thereupon the jury retired and after consideration returned the verdict which is copied in the judgment against defendant, and thereafter the defendant moved the court for a new trial on the grounds present- in its motion for a new trial and said motion was overruled.

The defendant here now tenders this its bill of exceptions embracing all of the foregoing matters and asks that the same
109 be allowed by the court and made a part of the record in this case.

STANLEY, SPOONTS & THOMPSON,
Attorneys for the Texas & Pacific
Railway Company, Defendant.

We agree that the above and foregoing is a true and correct bill of exceptions.

This June 8th, A. D. 1903.

BEN M. TERRELL,
Attorney for Plaintiff.

Allowed:

EDWARD R. MEEK,
United States District Judge.

The foregoing has the following endorsement, to-wit: No. 252. Geo. H. Dashiel *vs.* Tex. & Pac. Ry. Co. Bill of exceptions. Filed 8th day of June, 1903. J. H. Finks, clerk, by J. B. Finks, deputy.

Defendant's Assignments of Error.

Filed June 8th, 1903.

In the United States Circuit Court for the Northern District of Texas, at Fort Worth, Texas.

GEO. H. DASHIELL, by Next Friend,
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 252.

Now comes the defendant, The Texas & Pacific Railway Company, by counsel, and says that in the record of proceedings in the aboveentitled cause there is manifest error, to-wit:

1. The defendant asked the witness, J. E. Cheek, as to what was

the reputation of Geo. H. Dashiell as to being a man who drank or got on sprees at times; to which objection was made by the plaintiff and sustained by the court.

The court erred in sustaining said objection and in not allowing the witness to answer the question.

2. The witness, Mary J. Dashiell, mother of plaintiff, was asked by counsel for plaintiff, after describing the condition that her son was in after the injury and detailing her knowledge of his
110 history and transactions since the said accident, to state whether or not in her opinion plaintiff, Geo. H. Dashiell, was of sound mind. To which defendant objected, which objection was overruled and witness stated that in her opinion his mind was affected and had been ever since the injury.

The court erred in overruling and not sustaining the objection of the defendant and in allowing the said testimony to be admitted.

3. The witness. J. O. Bowles, testified that he had known Geo. H. Dashiell for six or seven years and knew him at Hillsboro, and was asked the question, to state if he knew what was Dashiell's general reputation while he knew him at Hillsboro, Texas, with reference to being a drinking or a sober man; to which objection plaintiff objected and which objection was sustained by the court and the witness was not allowed to answer.

It says that the court erred in sustaining said objection.

4. The court erred in refusing to give special charge No. 1, requested by defendant, which is as follows:

"In this case, under the law and the evidence, the jury will return a verdict for the defendant."

5. The court erred in refusing to give special charge No. 2, requested by this defendant, which is as follows:

"The jury are instructed that under the rules and regulations of the defendant company, it was the duty of Dashiell to so manage his train, when he caused the same to slow down for the purpose of letting a section man off, so as to advise the train following him of that fact either by a slow signal given from the rear of his train, or sending a flagman back with a lantern, or the use of some method which would advise the operatives of the rear train that his train was lessening its speed, and his failure to do so was negligence, and if they find that he had used such precautions those operating the rear train would have seen same in time to have checked the speed of their train and have avoided the accident, then the plaintiff cannot recover and your verdict will be for the defendant."

6. The court erred in refusing to give special charge No. 3, requested by this defendant, which is as follows:

"If the jury believe from the evidence that a reasonably prudent person in the exercise of ordinary care and having charge of the front train as conductor, knowing his train would have to be slowed down for the purpose of allowing a section foreman
111 to get off, would have given some proper warning to a train which was, or might be, following him, of that fact, and if

they find that the exercise of such care would have caused those on the train following him to have so checked or lessened the speed of their train as to have avoided the accident, then in such event Dashiell was guilty of negligence and your verdict will be for defendant, even though the operatives of the rear train were guilty of negligence in the manner in which the train was operated." (Which said charge was requested in event charge No. 2 above was refused.)

7. The court erred in refusing to give Special Charge No. 5, requested by this defendant, which is as follows:

"If you find from the evidence that Dashiell had advised Shea, conductor on the rear train, that he was going to put off a man at the section house east of Eastland, and you find that Shea, with this knowledge, approached said section house expecting to find Dashiell's train stopped or slowed down at that point, and if you find that at the time Shea's train came in sight of the section house Dashiell's train had passed same and no signal or warning was given to those on the rear train of the fact that his train was going to stop or slow down east of said section house, then you will take such facts into consideration in determining the question as to the degree of care which ought to have been exercised by those operating the rear train and also the degree of care which should have been exercised by Dashiell."

8. The court erred in refusing to give Special Charge No. 6, requested by this defendant, which is as follows:

"Although you may find that the manner in which the rear train was operated, to-wit: with the engine headed west and the caboose and other cars east of same, was more dangerous than had said engine been in front and headed east, yet, if you find that Dashiell knew of this fact, then the court instructed you that said Dashiell assumed the risk of danger incident to the manner in which the train was operated. That is to say, he assumed the risk of danger which arose from the manner in which the train was operated so far as such risk of danger pertained to the fact that the train was running headed west with the caboose and other cars in front and he cannot recover by reason of any liability for such negligence on the part of the defendant company, if any there was."

9. The court erred in refusing to give Special Charge No. 8, requested by this defendant, which is as follows:

112 "If a preponderance of the evidence does not establish the fact that the plaintiff's injuries are of a permanent nature, then you will disallow any claim therefor."

10. The court erred in refusing to give Special Charge No. 10, requested by this defendant, which is as follows:

"It was the duty of the plaintiff to observe and be governed by the rules of the defendant in existence at the time of the accident on December 24th, 1900, and to also use such care for his own safety and the safety of his train as a reasonably prudent man would have used under the same circumstances, and if his injury would not have been received but for his failure to observe such rules, or if he had

not failed to use the care and caution which a reasonably prudent man would have used under the same circumstances, if he did so fail, he would not have been injured, then and in either of said events he cannot recover in this suit."

11. The court erred in its charge to the jury, wherein the following language was used:

"On the question of the release of the defendant from liability for the injury sustained by plaintiff, you are charged that the agreement entered into between the plaintiff and the defendant company, which has been introduced in evidence, is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof, to-wit: injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to have been sustained by him resulting in the impaired mental powers and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action, and the consideration of which will be submitted to you in this charge."

12. The court erred in submitting to the jury the question of injuries to the plaintiff, for the reason that plaintiff was barred from recovery for same by reason of the release made and executed by him, which was introduced in evidence.

13. The court erred in not telling the jury that under and by virtue of the release executed by the plaintiff that he could not recover.

14. The court erred in that paragraph of the court's charge which defines contributory negligence, which charge was as follows:

113 "The burden of proving that the plaintiff was guilty of contributory negligence rests upon the defendant and unless the defendant has shown to you by a preponderence of the evidence that the plaintiff was guilty of negligence which contributed to his injury, then the defendant would fail on its plea of contributory negligence."

15. It says that the verdict and judgment of the jury was not supported by the law and the evidence, for the reason that it appeared that plaintiff, Geo. H. Dashiell, himself, was guilty of negligence which directly caused and contributed to the accident, in this that he was conductor on the front train and had occasion to let off a section foreman at or near the section house east of Eastland; that he failed in his duty in not giving proper signals and warnings to the train following him to stop or slow down and in allowing the rear train to follow him too closely. That if he had exercised the care and caution incumbent upon him he could and would have avoided the accident.

16. It says that the verdict and judgment of the jury as to the amount allowed plaintiff was not supported by the law and the evidence, for the reason that a fair construction of the evidence did not justify the jury in allowing the amount granted by the verdict as a fair interpretation of the evidence showed that plaintiff could not

have been seriously injured by reason of the accidents to him on the times and occasions alleged and shown by the evidence.

And for the errors herein defendant prays that the judgment be reversed and the cause remanded.

STANLEY, SPOONTS & THOMPSON,
T. J. FREEMAN,
Attorneys for Defendant.

The foregoing has the following indorsement, to-wit: No. 252. Geo. H. Dashiell *vs.* T. & P. Ry. Co. Def't's assignments of error. Filed 8 day of June, 1903. J. H. Finks, clerk, by J. B. Finks, deputy.

114 Petition for Writ of Error.

Filed June 8th, 1903.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

GEORGE H. DASHIELL, by Next Friend,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 252.

Petition for Writ of Error.

To the judges of the circuit court of the United States in and for the northern district of Texas, at Fort Worth, March term, 1903:

Your petitioner, The Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an act of Congress of the United States, respectfully represents: That at said term of said court, to-wit: on the 28th day of March A. D. 1903, the plaintiff, George H. Dashiell, recovered judgment against your petitioner in the sum of $7,500.00 besides interest at the rate of six per cent. per annum from date of judgment and costs of suit, in the proceedings for the recovery of which and in the rendition of which there was and is manifest error to the great prejudice of petitioner; that plaintiff, Geo. H. Dashiell, resides in the State of Texas, Tarrant county; that his next friend, Mary J. Dashiell, resides in Tarrant county, Texas, and that Ben M. Terrell, who is attorney of record for the said Geo. H. Dashiell, also resides in Tarrant county, Texas.

That petitioner has filed in this court its assignment of errors and here presents the same for the inspection of the court.

Wherefore, petitioner prays that it be granted a writ of error to remove said judgment and proceedings had in said cause, to the United States circuit court of appeals, for the fifth circuit, to be

holden at New Orleans, Louisiana, for revision, correction and reversal; and your petitioner will ever pray.

F. B. STANLEY,
M. A. SPOONTS,
GEORGE THOMPSON,
T. J. FREEMAN,
Attorneys for Petitioner.

115 Allowed June 8th, 1903.

EDWARD R. MEEK,
U. S. Dist. Judge,

The foregoing has the following indorsement, to-wit: No. 252. Geo. H. Dashiell *vs.* T. & P. Ry. Co. Petition for writ of error. Filed June 8, 1903. J. H. Finks, clerk, by J. B. Finks, deputy.

Writ of Error Bond.

Filed June 8th, 1903.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

GEO. H. DASHIELL, by Next Friend,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 252.

Know all men by these presents: That we, the Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an act of Congress of the United States, as principal, and Edw. O. Tennison and W. B. Buddy, as sureties, are held and firmly bound unto Geo. H. Dashiell, in the sum of twelve thousand, five hundred dollars, to be paid to said Geo. H. Dashiell, his executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals, using scrolls for seals, and signed with our names, this 8th day of June, 1903.

The condition of the foregoing obligation is such that whereas, lately, at a term of the circuit court for the northern district of Texas, at Fort Worth, in a suit pending in said court between Geo. H. Dashiell, by next friend, as plaintiff, and The Texas & Pacific Railway Company, as defendant numbered 252, on the docket of said court, a judgment was rendered on the 28th day of March, 1903, that the plaintiff, Geo. H. Dashiell should have and recover of the defendant the sum of seven thousand five hundred dollars, with six per cent. interest per annum thereon from date of rendition, as well as all costs of suit; and whereas, the Texas & Pacific Railway

Company has obtained a writ of error and filed a copy thereof in the office of the clerk of said court, to reverse said judgment, and also a citation directed to Geo. H. Dashiell, and his attorney
116 of record, Ben M. Terrell, citing and admonishing them to be and appear at the United States circuit court of appeals for the fifth circuit to be holden at New Orleans, within thirty days from the 8th day of June, 1903.

Now, if the said Texas & Pacific Railway Company, shall prosecute its writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By STANLEY, SPOONTS & THOMPSON, Attorneys.

Sureties:
EDW. O. TENISON.
C. R. BUDDY.

Approved as supersedeas and cost bond.

EDWARD R. MEEK,
U. S. District Judge.

The foregoing has the following indorsement, to-wit: No. 252. Geo. H. Dashiell *vs.* The Texas & Pacific Railway Company. Supersedeas and cost bond. Filed 8 day of June, 1903. J. H. Finks, clerk, by J. B. Finks, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court, before you, or some of you, between The Texas & Pacific Railway Company, plaintiff in error, and George H. Dashiell, (by next friend,) defendant in error, a manifest error hath happened, to the great damage of the said The Texas & Pacific Railway Company, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in -his behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and pro-
117 ceedings aforesaid with all things concerning the same, to the United States circuit court of appeals, for the fifth circuit, together with this writ, so that you have the same at New Or-

leans, Louisiana, in not exceeding thirty days from 8th day of June, 1903, being the date of issuance of the citation herein, in the United States circuit court of appeals, to be then and their held, that the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of June, in the year of our Lord one thousand nine hundred and three.

[SEAL.] J. H. FINKS,
Clerk of the Circuit Court of the United States,
for the Northern District of Texas,
By J. B. FINKS, Deputy.

Allowed by:
EDWARD R. MEEK,
United States District Judge.

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error, 8th day of June, 1903.

J. H. FINKS, Clerk,
By J. B. FINKS, Deputy

[Indorsement:] No. 252. Geo. H. Dashiell (by next friend) *vs.* The Texas & Pacific Railway Company. Writ of error. Filed 8 day of June, A. D. 1903. J. H. Finks, clerk, by J. B. Finks, deputy.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to George H. Dashiell (by next friend) and Ben M. Terrell, his attorney of record, Greeting:

You are hereby cited and admonished, to be and appear at the United States circuit court of appeals for the fifth circuit, to be held at the city of New Orleans, in the State of Louisiana, within thirty days from the date of this writ, pursuant to a writ of error in the clerk's office of the — court of the United States for the northern district of Texas, wherein The Texas and Pacific Railway Company is plaintiff in error, and George H. Dashiel (by next friend) is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of June, A. D. 1903, and of the Independence of the United States the 127 years.

[SEAL.] EDWARD R. MEEK,
United States District Judge.

Marshal's Return.

Received this writ at Fort Worth, Texas, June 10th, 1903, and executed the same on June 10th, 1903, at Fort Worth, Texas, by delivering a certified copy thereof to Ben M. Terrell, attorney for plaintiff.

GEO. H. GREEN,
U. S. Marshal, N. D. T.,
By WHIT DRYDEN, Deputy.

[Indorsement:] Marshal's docket No. 1134. No. 252. Geo. H. Dashiel (by next friend) *vs.* The Texas & Pacific Railway Company. Citation. Filed — day of June, A. D. 1903. J. H. Finks, clerk, by J. B. Finks, deputy.

119 Agreement as to Transcript.

Filed June 24th, 1903.

In the Circuit Court of the United States for the Northern District of Texas, at Forth Worth.

GEO. H. DASHIELL, by Next Friend,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 252.

We hereby agree that the following papers shall be included in and compose the transcript in the above styled and numbered cause, to-wit:

1. Plaintiff's first amended original petition.
2. Defendant's second amended original answer.
3. Plaintiff's first supplemental petition.
4. Defendant's supplemental answer.
5. Original release, in its original form.
6. Final judgment.
7. Defendant's amended motion for a new trial.
8. Order overruling same, and granting time in which to file bill of exceptions.
9. Bill of exceptions, all of same now on file.
10. Assignments of error.
11. Petition for writ of error.
12. Bond for writ of error.
13. Writ of error.
14. Citation.
15. Agreement as to transcript.
16. Clerk's certificate.

BEN M. TERRELL,
Attorney for Plaintiff.
STANLEY, SPOONTS & THOMPSON,
Attorney- for Defendant.

The foregoing has the following indorsement, to-wit: No. 252. Geo. H. Dashiell, by next friend, *vs.* Texas & Pacific Ry. Co. Agreement as to what shall compose transcript. Filed 24 day of June, 1903. J. H. Finks, clerk, by J. B. Finks, deputy.

120 Clerk's Certificate.

I, J. H. Finks, clerk of the circuit court of the United States in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignments of error and all proceedings had in cause No. 252, wherein George H. Dashiell, by next friend, is plaintiff, and The Texas and Pacific Railway Company is defendant, except that the original lease, the original writ of error and the original citation in error are included therein instead of copies thereof, as fully as the same remains on file and of record in my said office at Forth Worth, Texas.

Witness my hand officially, and the seal of the circuit court of the United States for the northern district of Texas, at Forth Worth, this the 25th day of June, A. D. 1903.

[SEAL.]

J. H. FINKS, Clerk,
By J. B. FINKS, Deputy.

121 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1903.

Nov. 11, 1903.

(Extract from Minutes.)

THE TEXAS AND PACIFIC RAILWAY COMPANY
vs.
GEORGE H. DASHIELL. } No. 1278.

On this day this cause was regularly called, and after argument by Geo. Thompson, Esq., for plaintiff in error, was continued for further argument.

November Term, 1903.

Nov. 12, 1903.

(Extract from Minutes.)

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
GEORGE H. DASHIELL. } No. 1278.

On this day this cause was called for further hearing, and after argument by Geo. Thompson, Esq., for plaintiff in error, and B. M. Terrell, Esq., for defendant in error, was submitted to the court.

November Term, 1903.

FEB. 2, 1904.

(Extract from Minutes.)

THE TEXAS AND PACIFIC RAILWAY COMPANY
vs.
GEORGE H. DASHIELL. } No. 1278.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern
122 district of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiff in error, The Texas and Pacific Railway Company, and the sureties on the writ of error bond herein, Edw. O. Tenison and C. R. Buddy, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

Feb. 2, 1904.

123 U. S. Circuit Court of Appeals. Filed Feb. 2, 1903. Charles H. Lednum, Clerk.

In the United States Circuit Court of Appeals, Fifth Circuit, at Fort Worth, November Term, 1903.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE H. DASHIELL, Defendant in Error. } No. 1278.

Error to United States circuit court for the northern district of Texas.

Before Pardee, McCormick and Shelby, circuit judges.

McCORMICK, circuit judge, delivered the opinion of the court.

This is an action for personal injuries, brought by the defendant in error, George H. Dashiell, by his next friend and mother, Mrs. Mary J. Dashiell, against the plaintiff in error, The Texas and Pacific Railway Company.

The learned judge before whom this case was tried in the circuit court, in his charge to the jury thus clearly and correctly states the issues made by the pleadings: "George H. Dashiell, by his next

friend, Mrs. Mary J. Dashiell, sues the defendant, The Texas & Pacific Ry. Company, for damages alleged to have been sustained by him by reason of personal injuries received on the 24th day of December, 1900, while he was in the service of the defendant company and conductor of a freight train. It is alleged that while he was in charge of a freight train as a conductor, running in an easterly direction on defendant's road in Eastland county,
124 the train of which he was in charge and on which he was riding was run into and collided with by another freight train following his; that said collision was caused by reason of the negligence and carelessness of the defendant and its agents and employés engaged in operating the train which collided with the one of which plaintiff was in charge. It is alleged that the defendant and its employés operating the train which collided with the one on which plaintiff was riding, were guilty of negligence in running the same with the cars in front of the engine, the cars being pushed instead of being pulled by the engine; that the defendant and its employés were also guilty of negligence in not maintaining a sufficient watch or lookout to ascertain the proximity of the train on which he was riding; and further, that the defendant at the time and place of the collision and prior thereto, had enforced for the government and guidance of its employés operating the colliding trains, rules and regulations substantially to the effect that when one freight train follows another it should not do so at a less distance of space and time than five minutes, and that the defendant, its agents and employés were at the time of the collision, negligently violating said rules and were operating the colliding train at a much less distance of space and time than five minutes, and that by reason of this negligent disregard of the rules of the company the accident was caused and contributed to. It is charged that by reason of these various acts of negligence the collision was occasioned and plaintiff injured thereby. Plaintiff alleges that since the accident he has been *non compos mentis*, that is his mind is weak and unsound and that he is incapable mentally of transacting any business and that such is his condition now. He also charges that he was badly burned and bruised about the legs, sides, back, arms, hands and head, and that his left eye has become seriously affected by reason of the injury to his head. He alleges that as a result of the alleged negligence of the defendant, and his injury con-
125 sequent thereon, that he now suffers and will continue to suffer great physical pain and mental anguish. He also alleges his damages.

"The defendant, The Texas & Pacific Railway Company, answers the petition of plaintiff and denies each and every allegation contained therein. For special answer it in part says that plaintiff cannot recover in this action for the reason that he was himself guilty of negligence which directly and proximately caused and contributed to his injuries, and that but for such negligence on his part the accident resulting in his injuries would not have occurred,

That the negligence on the part of plaintiff was, as follows: That he, while riding upon the freight train of which he was in charge, had full knowledge that another train was following his train. That he directed and knew, or should have known, that his train was to be brought to a standstill, or the speed of the same slackened, in order that a person who was riding upon the same might get off; that he negligently and carelessly failed to send any flagman back to warn the train following, or place any torpedo upon the track, or give any signal or warning to the rear train, or use any precaution whatever, to appraise the rear train that the speed of the train upon which plaintiff was riding would be or had been lessened. That it was the duty of the plaintiff under the circumstances to see that those in charge of the rear train should not approach too near to the train upon which he was riding, and to use all proper signals to accomplish that result. That had plaintiff used reasonable care in this respect, said accident would not have occurred. The defendant further charges that Dashiell and it made and entered into a certain contract of agreement and release, by which it paid Dashiell the sum of $30.00 and for such consideration was released from all liability for damages resulting from said accident and injury.

"The plaintiff by its supplemental petition and answer to the defendant, alleges that the release made by him was for certain of the injuries so suffered, but did not include the injury occasioned
126 to his mind, nor the injury occasioned to his left eye by reason of said accident. That these latter injuries were not in contemplation of the parties at the time the contract of release was entered into, and the defendant's liability, therefore, is not released by said contract."

A number of witnesses were called, by each of the parties, to testify as to the conditions and circumstances under which the injuries complained of were received. In the volume of the testimony there is ample evidence tending to show the negligence of the defendant below, the plaintiff in error. As to the burden of the proof; and the duties and obligations of the defendant railway company; and the practical definitions of the terms negligence and contributory negligence and ordinary care, and the liability or not of the respective parties in view of these definitions applied to the proof; these are all covered and correctly by the general instructions of the trial judge. The fellow-servant doctrine as held at common law does not apply to this case, by reason of the Texas statute of June 18, 1897, Session Acts, First Called Session, Twenty-fifth Legislature.

At the request of the plaintiff in error, the judge gave the following charges:

"4. In determining the question of the negligence of Dashiell, it is your duty to take into consideration the facts surrounding the situation. You should take into consideration the fact that he knew, or ought to have acted upon the presumption that a train was following or liable to be following him, and the fact that he

had caused the speed of his train to be lessened, and the position and place of the train, and from all these facts determine whether or not a reasonably prudent person in the exercise of ordinary care would by some proper signal have notified those upon the rear train of this fact. It was the duty of Dashiell to use reasonable care to protect his train, and if he failed in this respect and
127 such failure caused and contributed to the accident, that is to say, but for such failure on his part the accident would not have occurred, then they will find for the defendant, even though there was negligence on the part of those upon the rear train.

"7. The duty of the railroad company towards its employés in reference to the running and operating of its trains is that it use ordinary care. Although the jury may find that it would have been safer to run the train with the engine ahead of the cars headed either east or west, yet if they find that the manner in which it was operated was such as a reasonably prudent person in the exercise of ordinary care would have operated it, under all the conditions and circumstances, taking into consideration the rules and regulations of practical railroading, then in such respect the defendant would not be negligent and no liability would arise therefrom.

"9. The jury are instructed that the fact that some kind of settlement was made with Dashiell with reference to his injuries, or a part of same, is not evidence of admission on the part of the defendant that any liability existed, and in so far as determining the liabilities of the defendant, you will exclude that from your consideration and try the case alone upon the law as given by the court and the evidence admitted under its ruling, and the same considerations will apply to the fact that Dashiell was not discharged by the company, but retained in its service. These are not matters which you will look to at all, but which you will exclude entirely from your consideration of this case."

In connection with requested charge No. 9, as just shown, the judge, on his own motion, gave this further charge:

"On the question of the release of the defendant from liability for the injury sustained by plaintiff you are charged that the agreement entered into between the plaintiff and the defendant company, which has been introduced in evidence, is a release of the defendant from liability for the particular injuries which are enumer-
128 ated in the face thereof, to-wit: injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to have been received by him resulting in the impaired mental powers, and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action, and the consideration of which will be submitted to you in this charge."

Besides the requested charge No. 4, as shown above to have been given, the judge, on his own motion, charged the jury, as follows: 'Now, if you believe from the evidence that the plaintiff, Dashiell,

failed to send back any flagman to warn the train which was following his train and failed to have any torpedoes put upon the track and failed to give a signal or warning to the rear train or to so use any of the precautionary measures testified about to apprise the train following that the speed of the train of which he was in control had been slackened, and if you believe that his failure to take any one, or more, of these precautionary steps was negligence on his part, and if you believe that this negligence on his part directly and proximately contributed to the accident which resulted in his injuries, then and in that event it will be your duty to find for defendant, even though you should find that it, through its agents and servants, was guilty of negligence in any one or all of the respects referred to in this charge. If you believe from the evidence that the injuries and troubles of which the plaintiff now complains are the result of a failure on his part to take proper care of himself in the use by him of intoxicating liquors, then and in that event it will be your duty to find for the defendant."

There was no proof in the case tending to show that the train of which the defendant in error was conductor came to a full stop at any time or place near the happening of the accident. There was conflict in the testimony as to how far its rate of speed was slackened at any time. It was shown, beyond dispute, that near
129 the place where the accident occurred the rate of speed was slackened sufficiently to allow an employé to alight from the train. There was proof tending to show that the conductor of the following train had been informed that at the place, or near the place, where the employé left the forward train its conductor had orders to let this employé off.

The defendant requested the court to give its special charge No. 1, as follows: "In this case under the law and the evidence the jury will return a verdict for the defendant." This charge the court refused to give, and this refusal is assigned as error.

We have carefully examined all of the testimony offered on the trial and are clear in our view that the court did not err in refusing to withdraw the issues of fact from the jury. The other assignments present the usual questions raised in actions of this kind, and a careful examination of the briefs of the respective counsel has satisfied us that this case does not call for a reannouncement of rules already settled, or for any illustration of them by pointing out their application to the particular circumstances and conditions which the proof in this case presents.

We have been unable to find any error in the action of the trial judge for which his judgment should be reversed, and it is therefore affirmed.

130 United States Circuit Court of Appeals, Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GEORGE H. DASHIELL, Defendant in Error.
} No. 1278.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above entitled cause, there is manifest error in this, to-wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to allow defendant to prove by the witness, J. E. Cheek, as to what was the reputation of Geo. H. Dashiell as to being a man who drank or get on sprees at times, to which objection was made by the plaintiff and sustained by the court.

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in allowing plaintiff to prove by the witness, Mary J. Dashiell, mother of plaintiff, that the mind of plaintiff was affected, and had been ever since the injury, to which defendant objected, which objection was overruled by the court.

IV.

The circuit court of appeals erred in its judgment affirming
131 the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in sustaining the objection of plaintiff, and refusing to allow the witness J. O. Bowles, to testify as to the general reputation of plaintiff while he knew him at Hillsboro, Texas, with reference to being a drinking or sober man, said witness having testified that he had known plaintiff six or seven years, and knew him at Hillsboro, Texas.

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and

in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"In this case, under the law and the evidence, the jury will return a verdict for the defendant."

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"The jury are instructed that under the rules and regulations of the defendant company, it was the duty of Dashiell to so manage his train, when he caused the train to slow down for the purpose of letting a section man off, so as to advise the train following him of that fact, either by a slow signal given from the rear of his train, or sending a flagman back with a lantern, or the use of some method which would advise the operatives of the rear train that his train was lessening its speed, and his failure to do so was negligence, and if they find that had he used such precautions, those operating the rear train would have seen same in time to have checked the speed of their train and have avoided the accident, then the plaintiff cannot recover, and your verdict will be for the defendant.

VII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of
132 Texas, and in holding that said court committed no error in refusing to give special charge as asked by plaintiff in error, as follows;

"If the jury believe from the evidence that a reasonably prudent person, in the exercise of ordinary care, and having charge of the front train as conductor, knowing his train would have to be closed down for the purpose of allowing a section foreman to get off, would have given some proper warning to a train which was, or might be, following him, of that fact, and if they find that the exercise of such care would have caused those on the train following him to have so checked or lessened the speed of their train as to have avoided the accident, then in such event Dashiell was guilty of negligence, and your verdict will be for defendant, even though the operatives of the rear train were guilty of negligence in the manner in which the train was operated."

VIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"If you find from the evidence that Dashiell had advised Shea, conductor on the rear train, that he was going to put off a man at the section house east of Eastland, and you find that Shea, with this knowledge, approached said section house expecting to find Dashiell's train stopped or slowed down at that point, and if you find that at the time Shea's train came in sight of the section house, Dashiell's train had passed same and no signal or warning was given to those on the rear train of the fact that his train was going to stop or slow down east of said section house, then you will take such facts into consideration in determining the question as to the degree of care which ought to have been exercised by those operating the rear train, and also the degree of care which should have been exercised by Dashiell."

IX.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"Although you may find that the manner in which the rear train was operated, to-wit: with the engine headed west and the caboose and other cars east of same, was more dangerous than had said engine been in front and headed east, yet, if you find that Dashiell knew of this fact, then the court instructed you that said Dashiell assumed the risk of danger incident to the manner in which the train was operated. That is to say, he assumed the risk of danger which arose from the manner in which the train was operated, so far as such risk of danger pertained to the fact that the train
133 was running headed west with the caboose and other cars in front, and he cannot recover by reason of any liability for such negligence on the part of the defendant company, if any there was."

X.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"If a preponderance of the evidence does not establish the fact that the plaintiff's injuries are of a permanent nature, then you will disallow any claim therefor."

XI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"It was the duty of the plaintiff to observe and be governed by the rules of the defendant in existence at the time of the accident on

December 24, 1900, and to also use such care for his own safety and the safety of his train as a reasonably prudent man would have used under the same circumstances, and if his injury would not have been received but for his failure to observe such rules, or if he had not failed to use the care and caution which a reasonably prudent man would have used under the same circumstances, if he did so fail, he would not have been injured, then and in either of said *events he cannot recover in this suit.*"

XII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in its charge to the jury, wherein the following language was used:

"On the question of the release of the defendant from liability for the injury sustained by plaintiff, you are charged that the agreement entered into between the plaintiff and the defendant company, which has been introduced in evidence, is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof, to-wit: injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to have been sustained by him resulting
134 in the impaired mental powers and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action, and the consideration of which will be submitted to you in this charge."

XIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in submitting to the jury the question of injuries to the plaintiff, for the reason that plaintiff was barred from recovery for same by reason of the release made and executed by him, which was introduced in evidence.

XIV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in not telling the jury that under and by virtue of the release executed by the plaintiff that he could not recover.

XV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in that paragraph of the court's charge which defines contributory negligence, which charge was as follows:

"The burden of proving that the plaintiff was guilty of contributory negligence, rests upon the defendant, and unless the defendant has shown to you by a preponderance of the evidence that the plaintiff was guilty of negligence which contributed to his injury, then the defendant would fail on its plea of contributory negligence."

XVI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, in that the verdict and judgment of the jury was not supported by the law and the evidence, for the reason that it appeared that plaintiff,
Geo. H. Dashiell, himself, was guilty of negligence, which di-
135 rectly caused and contributed to the accident, in this, that he was conductor on the front train and had occasion to let off a section foreman at or near the section house east of Eastland; that he failed in his duty in not giving proper signals and warnings to the train following him to stop or slow down, and in allowing the rear train to follow him too closely; that if he had exercised the care and caution incumbent upon him, he could and would have avoided the accident.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, for the reason that the verdict and judgment of the jury as to the amount allowed plaintiff was not supported by the law and the evidence, for the reason that a fair construction of the evidence did not justify the jury in allowing the amount granted by the verdict as a fair interpretation of the evidence showed that plaintiff could not have been seriously injured by reason of the accidents to him on the times and occasions alleged and shown by the evidence.

Wherefore, The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment be reversed, and it will ever pray.

T. J. FREEMAN,
Attorney for The Texas & Pacific
Ry. Co., Plaintiff in Error.

The foregoing has the following endorsements, to-wit:

No. 1278. The Texas & Pacific Railway Company *v.* George H. Dashiell. Assignment of errors. Filed 27 day of Febr'y, 1904, Charles H. Lednum, clerk of the United States circuit court of appeals.

136 Copy.

Know all men by these presents, that we, The Texas and Pacific Railway Company, as principal, and Frank Jay Gould, of Tarrytown in the State of New York, as surety, are held and firmly bound unto George H. Dashiell in the full and just sum of fifteen thousand

(15,000) dollars, to be paid to the said George H. Dashiell — certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of February, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a regular term of the United States circuit court of appeals for the fifth circuit in a suit depending in said court, between The Texas and Pacific Railway Company plaintiff in error and George H. Dashiel, defendant in error a judgment was rendered against the said railway company affirming a judgment of the circuit court of the United States for the northern district of Texas for the sum of seven thousand five hundred dollars ($7,500.) in favor of said George H. Dashiell, and the said The Texas and Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George H. Dashiell citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Texas and Pacific Railway Company shall prosecute its said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By FRANK JAY GOULD, Vice Pres't.
FRANK J. GOULD. [SEAL.]

Sealed and delivered in presence of—
[SEAL.] D. D. DUNCAN.

Attest: C. E. SATTERLEE, Sec'y.

Approved to operate as a supersedeas by—
EDWARD D. WHITE,
Associate Justice of the Supreme Court
of the United States.

[Endorsed:] (Copy) No. 1278. The Texas and Pacific Railway Company, *vs.* George H. Dashiell. Writ of error bond. U. S. circuit court of appeals, Filed Feb. 27, 1904. Charles H. Lednum, clerk.

137 United States Circuit Court of Appeals for the Fifth Circuit

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 137 pages, numbered from *a* to 136, inclusive, contain a true copy of the

record, assignment of errors and all proceedings had, including the opinion of the court, in the case of The Texas & Pacific Railway Company, *versus* George H. Dashiell, No. 1278, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, Louisiana, this 14th day of March, A. D. 1904.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.

138 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between The Texas and Pacific Railway Company plaintiff in error and George H. Dashiell, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of February, in the year of our Lord one thousand nine hundred and four.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
EDWARD D. WHITE,
Associate Justice of the Supreme
Court of the United States.

[Endorsed:] Writ No. 1278 The Texas and Pacific Railway Company, *vs.* George H. Dashiell Writ of error U. S. circuit court of appeals, Filed Feb. 27 1904 Charles H. Lednum clerk.

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, Clerk.

139 UNITED STATES OF AMERICA, *ss:*

To George H. Dashiell or his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the fifth circuit wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 25th day of February, in the year of our Lord one thousand nine hundred and four.

EDWARD D. WHITE,
Associate Justice of the Supreme Court
of the United States.

[Endorsed:] No. 1278 In United States circuit court of appeals for the fifth circuit The Texas & Pacific Railway Company plaintiff in error *versus* George H. Dashiell defendant in error Citation Filed 14 day of M'ch 1904 Charles H. Lednum clerk of the United States circuit court of appeals.

I, Ben M. Terrell, attorney of record for George H. Dashiell in this case, hereby acknowledge service of the within citation and acknowledge service of copy of said citation, and agree that this acknowledgement shall take the place of and be in lieu of service of citation herein, this the 9th day of March, 1904.

BEN M. TERRELL,
Attorney of Record for George H. Dashiell.

Endorsed on cover: File No. 19,276. U. S. C. C. of appeals, 5th circuit. Term No. 212. The Texas & Pacific Railway Company, plaintiff in error, *vs.* George H. Dashiell. Filed March 21, 1904. File No. 19,276.

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. GEORGE H. DASHIELL.	No. 212.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

The following is a sufficient statement of the pleadings, evidence and proceedings in this case for the purpose of this hearing. A very full statement thereof is found in the opinion of the Circuit Court of Appeals (Tr., p. 105 *et seq.*).

This suit was originally brought in the District Court of Tarrant County, in the State of Texas, and was removed by the defendant into the Circuit Court of the United States for the Northern District of Texas, sitting at Fort Worth, because the defendant railway company is a corporation under a law of the United States.

Plaintiff, by his next friend, alleged that he sustained injuries on December 24th, 1900, in a rear end collision

between a freight train of which he, plaintiff, was conductor and in charge at the time and a working train of the defendant company, the accident being caused by the negligence of the defendant, its agents and employees; that he was thereby injured in and about his head, eyes, back, sides, arms and shoulders, and in the organs and functions of his brain and nervous system, and as a result thereof the sight of his left eye is impaired and that of his right eye weakened through sympathy, and that he is of unsound mind.

The defendant made a general denial, alleged contributory negligence and pleaded in bar a contract of agreement and release by which defendant claimed to be released from all liability for damages resulting from the accident. The release was attached to and made a part of the answer, and is as follows (Tr., p. 14):

ORIGINAL RELEASE.

FILED MARCH 28TH, 1903.

"Whereas on and prior to the 24th day of December, 1900, I, G. H. Dashiell, was employed by the Texas and Pacific Railway Co., as brakeman and extra freight conductor at or near Eastland, Texas, on the said 24th day of December, 1900, about 3:15 o'clock A. M. I sustained certain personal injuries in the manner and of the character described, to the best of my knowledge and ability, to wit:

"Extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm and giving me a scalp wound.

"And, whereas, it is by said railway company and myself mutually desirable to maintain amicable and pleasant relations and avoid all controversy in respect to said matter.

"Now, therefore, to that end, and in consideration of thirty and no-100 dollars, to me now here paid in cash by said Texas & Pacific Railway Company, I hereby release and acquit, and by these presents bind myself to indemnify and forever hold harmless said Texas & Pacific Railway Company, from and against all claims, demands, damages and liabilities, of any and every

kind or character whatsoever, for or on account of the injuries and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing, or hereafter arising or accruing, in any way, therefrom.

"It is expressly understood that, although we remain as free to contract with each other as if this transaction had not occurred, the Texas & Pacific Railway Company has not and does not agree to bind itself to employ me at or for any time, or in any capacity whatsoever.

"And it is also expressly understood, that all promises and agreements respecting or in any wise relating to the subject hereof, are fully expressed herein and no others are made or exist.

Signed in duplicate, this 2d day of February, 1901.

G. H. DASHIELL.

"Witnesses:

J. A. HILLIS.

J. H. YOUNG."

Plaintiff demurred (Tr., p. 8) on three grounds: 1st, that the release on its face shows that Dashiell did not undertake, intend or contract to release defendant from any injuries except "Bruising my body, right leg, right arm and a scalp wound"; 2d, that the general words of the release are limited by the specific recital of injuries contained in its first clause; and 3d, that the release did not acquit defendant of liability for damages for injuries to his skull, brain, head, eyes and mental functions and nervous system, which injuries were not included in said contract of settlement. In his first supplemental petition plaintiff pleaded (Tr., p. 9) that if the Court held against him on the demurrers and if plaintiff did sign the release and if he did continue in the service of the defendant thereafter, yet that he executed the release while *non compos mentis*, and that when he signed the release (if he did sign it) he was mistaken as to the extent, nature and character of his injuries, and at the time when he worked for the railway company after his injury, which was claimed to be a ratification of the release, both he and the defendant and its agents were

mistaken as to the extent, nature and character of the injuries, and did not at those times take their seriousness into account (Tr., p. 11). At the trial plaintiff abandoned all these defenses of incompetency to execute the release because of his being *non compos mentis* and of mistake as to the nature and extent of the injuries he had received, and offered no proof thereon.

It appeared from the evidence that the plaintiff and one Berry were injured December 24, 1900; that plaintiff returned to his work as conductor of one of defendant's freight trains on January 3, 1901; that the release was executed February 2, 1901, *there being no evidence whatever that his mind was then in any way affected or that the release was obtained by fraud or misrepresentation, or that there was any mistake of facts;* that he remained in the employ of the defendant continuously (Tr., p. 67) until March 23, 1901, when he was discharged for intoxication (Tr., pp. 66, 67).

The evidence also shows that Dashiell, on August 3d, 1901, made an application for employment in the Chicago, Rock Island & Pacific Railway, in which he stated in reply to a question as to the cause of his leaving his last situation that he was "Dismissed for violation of the company's rules, T. & P. R. R., Ft. Worth, Texas," (Tr., p. 81), and repeated the statement in his answer to the next question (Tr., p. 82).

Dashiell made a report of the accident (Tr., p. 85), but it bears no date.

It also appears from the evidence that plaintiff was paid by the defendant railway company his wages or salary for the months of December, 1900, and February and March, 1901, the amount for January not having been put in evidence by agreement of counsel (Tr., p. 87).

Nothing appears in the record concerning the release except its introduction in evidence and the trial Judge's ruling thereon (Tr., pp. 76, 77).

There was testimony to the effect that more than a

year after the accident symptoms of mental weakness and nervous excitement appeared (Tr., pp. 25, 26, 32, 35), but the testimony was conflicting as to the fact and as to whether these conditions were the result of the injuries or of excessive indulgence in the use of liquor.

Trial was had before Hon. EDWARD R. MEEK and a jury, and resulted in a verdict for the plaintiff in the sum of $7,500, for which sum judgment was duly entered.

A writ of error was sued out from the United States Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the judgment below February 2, 1904.

The case comes to this Honorable Court by writ of error from said judgment of affirmance.

Assignments of Error.

The following are the assignments of error relied upon:

XII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in its charge to the jury, wherein the following language was used:

"On the question of the release of the defendant from liability for the injury sustained by plaintiff, you are charged that the agreement entered into between the plaintiff and the defendant company, which has been introduced in evidence, is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof; to wit, injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to have been sustained by him resulting in the impaired mental powers and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action, and the consideration of which will be submitted to you in this charge."

XIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in submitting to the jury the question of injuries to the plaintiff, for the reason that plaintiff was barred from recovery for same by reason of the release made and executed by him, which was introduced in evidence.

XIV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in not telling the jury that under and by virtue of the release executed by the plaintiff that he could not recover.

BRIEF.

I.

The release on its face was intended by the parties to apply not only to injuries then known, but to such as might develop thereafter.

When the Court carefully reads the release involved in this case, we believe it will without hesitation conclude it was by its terms intended to be a final settlement of all claims growing out of the accident to the plaintiff.

Only the necessity of getting it out of the way in order to mulct in damages a railway corporation for

the benefit of an unfortunate employee could suggest the hair-splitting process by which it is sought to render this release ineffective. By a similar process still further actions may hereafter be instituted on the same cause of action for injuries to plaintiff not now known or suspected.

The object of executing the release is stated in the instrument itself to be—

" and whereas it is by said railway company and myself mutually desirable to maintain amicable and pleasant relations, and *avoid all controversy in respect to said matter*," etc.

That the " said matter " refers to the accident and not simply to injuries enumerated is evident from the recital which is in these words :

" Extra East Eng. 189 struck caboose of Extra Engine 255, 2½ miles East of Eastland, bruising my body, right leg and right arm, and giving me a scalp wound."

Properly construed the words " bruising my body, right leg, right arm and giving me a scalp wound," as used in the release, merely identify the accident described in the words preceding, which accident was the *cause of action.* If the release was intended to relate only to the enumerated injuries, why should the words " said matter " instead of " said injuries " be used ? Injuries are not referred to as " a matter." An accident being the cause of action may be so designated.

But the contract proceeds :

" I hereby release and acquit and by these presents bind myself to indemnify and forever hold harmless said Texas & Pacific Railway Company from and against all claims, demands, damages and liabilities of any and every kind or character whatsoever *for or on account of the injuries and damages* sustained by me *in the manner or upon the occasion* aforesaid and arising or accruing or hereafter arising or accruing in any way therefrom.

Is there here any suspicion of an intent to confine the release to the certain injuries enumerated? Is there anything in this release which tends to show that the releasor did not intend to absolve the railway company from the consequences of the accident to the plaintiff? If so why did he use the words "in the manner or upon the occasion aforesaid" and specify all claims, demands, &c., "arising or accruing or *hereafter* arising or accruing therefrom"?

The record contains no evidence of what occurred at the time the instrument was signed by Dashiell, but it does appear that in a letter written by Dashiell two weeks before he executed the release he knew there might be more serious consequences than he afterwards enumerated. He wrote under date of January 15th, 1901 (Tr., p. 77).

"I am afraid I was hurt worse than I thought at— I am in bad shape yet and don't think I ever will be as good a man as I was before I was hurt, but hope I will get all right, etc."

As this letter was written to the Superintendent of the defendant railway company it appears beyond contradiction that at the time the release was executed both parties to it knew of the possibility of further unfavorable developments. Can it be said that under these circumstances the release referred only to the enumerated injuries when its terms did not expressly and explicitly so recite? It is apparent that plaintiff's present contention is an afterthought. It has been held that a cause of action may be "split" in a settlement for injuries but that in such case the intention must be clear and explicit (*Quebe vs. Gulf, Colorado & Sante Fe R. R. Co., 97 Texas,* , hereinafter particularly referred to).

II.

The construction put upon the release by the learned trial Judge is contrary to law and is error, which works serious injustice and requires a reversal of the judgment.

When the release was offered in evidence by the defendant the trial Judge admitted it and said (Tr., p. 77):

"The release will obtain as to the particular matters or injuries set out specifically in the first part of it. There will be no recovery for any injuries which are specifically set out in the release, because that release has not been set aside. Only those matters, or injuries, will be submitted to the jury which are not incorporated in the release."

To which ruling and action of the Court an exception was immediately taken in open court.

The Court charged the jury as follows (Tr., p. 91):

"On the question of the release of the defendants from liability for the injury sustained by plaintiff you are charged that the agreement entered into between the plaintiff and the defendant company which has been introduced in evidence is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof, to wit, injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to have been received by him, resulting in the impaired mental powers and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action and the consideration of which will be submitted to you in this charge."

To this charge of the Court the defendant duly excepted (Tr., p. 94). The twelfth, thirteenth and fourteenth assignments of error preserve the exceptions as

to the construction put upon the release by the trial Court for the consideration of this Honorable Court.

At the hearing before the Circuit Court of Appeals, counsel for plaintiff placed much reliance upon remarks made in the decision of *U. P. Railway Company vs. Artist, 60 Fed. Rep., 365; 19 U. S. App., 912*, where SANBORN, Circuit Judge, sitting in the Circuit Court of Appeals said:

"General words alone in a release are taken most strongly against the releasor. But where there is a particular recital followed by general words the latter are qualified by the particular recital."

The facts of that case were that plaintiff, an employee of the railway company, having been injured in an accident was sent to one of the company's hospitals where he was treated and afterwards discharged as cured. About a week later he executed a release for an agreed consideration. Some months thereafter he began to suffer pain in his leg and it was discovered that a careless surgeon or attendant had allowed a piece of drainage tube to remain in the original wound. He brought suit for damages and the railway company pleaded the release. Plaintiff recovered judgment. On appeal the judgment was reversed on the ground that the trial Court should have given instructions asked by the railway company in effect that it could be held liable only for its own negligence in the employment of its physicians and attendants and not for the negligence of such surgeons and attendants. In the case there were two causes of action; one for an accident for which a release had been given, the other for the careless act of the hospital surgeon or attendant which was not known when the release was executed and which was therefore not subject to the release.

The release, after specifying certain injuries, contained the following general clause:

"In consideration of the payment of said sum of money, I, Andrew S. Artist, of Cheyenne, in the County of Laramie, in the State of Wyoming, hereby remise,

release and forever discharge the said company, its operated, leased, controlled and auxiliary lines and companies, of and from all manner of actions, causes of action, suits, debts and sums of money, dues, claims and demands whatsoever, in law or equity, which I have had or now have against said company by reason of any matter, cause or thing whatever, whether the same arose upon contract or upon tort, from the beginning of the world to this day."

Judge SANBORN, in *Greene vs. Chicago and N. W. Railroad Company, 92 Fed. Rep., 873, 880 (C. C. A.)*, referring to the Artist release, said:

"This release is not of the character of that quoted in Railway Company vs. Artist, in which it was held that a release of a claim for damage on account of injuries to the person from a collision with a railroad car which was specifically described and also from all manner of actions, causes of action, claims and demands whatsoever 'from the beginning of the world to this day' did not cover a cause of action for malpractice which was unknown to both parties when it was signed."

That it differs radically from the release now at bar is apparent by simple comparison. The Artist release follows the old form intended to dispose of all controversies between the parties, whether founded on the same cause of action or on others, while the release now before the Court, in its general clause, covers only such claims and damages as were sustained by Dashiell "in the manner or upon the occasion aforesaid, whether then arising or thereafter arising or accruing."

As every instrument of the character of the release in this case must be construed with reference to its own terms and recitals, it is obvious that rules of construction which may govern in one case do not apply where the instruments differ materially in form. Thus the rule of construction as stated by Judge SANBORN in the Artist case cannot be invoked in this case because of the utter dissimilarity of the general clauses.

We also contend as a general principle of construction, applicable to all releases, that while mistakes of fact may be sufficient to avoid a release, ignorance of future effects of an injury does not render the instrument inoperative or void.

The ruling or construction which we contend for is very accurately stated by Chief Justice PAXON in the case of *Currier vs. Bilger, 149 Pa. St., 109*, in which the facts are exceedingly simple. Plaintiff's horse was gored by a bull; settlement was made for the injury by receipt as follows: "Received of Jacob Bilger fifteen dollars for damages by bull hooking horse. In full." A week later the horse died and plaintiff sued for its value. Defendant pleaded the receipt in bar.

Chief Justice PAXON said:

"Plaintiff made the mistake of underestimating consequences of the injuries to his horse, and by making settlement with the defendant before they were accurately ascertained. This may be his misfortune, but it is one the law cannot remedy. No one will contend that if he had brought suit for the fifteen dollars and recovered he could have maintained a second suit for the death of the horse. He could not have had two suits for one injury, nor could he have settled with the defendant and sustained a suit to recover additional damages for the same injury. In other words, he cannot first recover damages for the injury and then sustain a suit for the consequences of the injury."

In another Pennsylvania case, *Maud Kane vs. Chester Traction Company, 186 Pa. St., 145*, it was said by *Mitchell*, J. (p. 149–150):

"On the contrary her own testimony shows quite plainly that whatever reluctance she had in accepting the sum offered was due to her desire to get more and her subsequent dissatisfaction arose from her belief that she ought to have got more and that her injuries were greater than she at the time thought. This is no ground for avoiding a settlement" (citing *Seeley vs. Traction Company, 179 Pa. St., 334*).

So, also, it has been held that sickness which comes upon the releasor subsequently, although caused by an

accident must be held to have been in contemplation and included within the terms of the release (*Eckels vs. Union Pacific Railway Company, 7 Utah, 335*).

Where a release was executed upon the belief based on the opinion of a physician employed by both parties that the releasor would not be affected by the injuries more than two or three weeks, when in fact he never entirely recovered from them, it was held that the releasor could not avoid the release (*Nelson vs. Minn. St. Ry. Co., 61 Minn., 167.*

In *Shooks vs. Illinois Central R. R. Co., 155 Fed. Rep., 57*, the facts bear a remarkable resemblance to those in the case at bar, but the case turned upon the issue whether or not the plaintiff was mentally affected at the time he executed the release and also upon the issue whether the injury to plaintiff's brain was in fact in contemplation of the parties and included in the settlement of the case and whether it was one for the jury.

SANBORN, Circuit Judge, in *Chicago & N. W. Ry. Co. vs. Wilcox, 116 Fed. Rep. 913, 917*, clearly and forcibly stated the proposition we contend for as follows:

"It is a mistake as to the existence of a past or present fact material to a contract, and that alone, that will warrant its rescission on the ground of mistake. Conceding, for the moment, that the doctor and the agent told the complainant that there was no doubt that she would be well in a year; that she believed this statement; that she relied upon it, and that she has never recovered,—still these facts do not establish a mistake of fact which will warrant the avoidance of a solemn agreement of settlement. The mistake which they established was a mistake in prophecy, in opinion regarding the happening of a future event on the part of the doctor and the agent, and a mistake in belief as to what the future had in store for her on the part of the complainant. The future duration of the disability, the future effect of the injury, were not matters of fact, but matters of conjecture, of opinion, of belief. * * * Ignorance of the duration of the disability and of the ultimate effects of the injuries always exist where compromises are made before a complete recovery is effected. The cases are doubtless rare where the

duration of the disability corresponds with the prophecy of the physician or with the belief of the parties when settlements are made. But compromises and releases are not voidable on this account, for the reason that the parties to them know the uncertainty of these future events, and, by the very fact of settlement before they develop, agree to take the chances of their effects. Their mistakes relative to the future duration of the disabilities and the future effects of the personal injuries that form the subjects of their contract are mistakes of belief, and not of fact, and form no basis for the avoidance of their contract. Such was the mistake under which the complainant labored. It was a mistake in the opinion of the doctor and in the belief of his patient with reference to unknowable future events. It was not a mistake of a past or a present fact, and it presents no ground for a rescission of this release," citing and quoting from *Kowalke vs. Light Co. (Wis.), 79 N. W., 762, 765*, and *Homuth vs. Railway Co., 129 Mo., 629, 645 ; 31 S. W., 903.*

SINCE THE JUDGMENT IN THIS CASE WAS AFFIRMED BY THE CIRCUIT COURT OF APPEALS, THE LAW IN THE STATE OF TEXAS, WHERE THE CAUSE OF ACTION IN THIS CASE AROSE, HAS BEEN SETTLED IN OUR FAVOR BY THE SUPREME COURT OF THAT STATE.

The decision was rendered May 26, 1904, and is reported in 10 Texas Court Reporter, 296 (from which the opinion below is copied) ; 81 S. W., 20 ; and is to appear in 97 Texas.

For the convenience of the Court, we print the opinion in full.

QUEBE v. GULF, C. & S. F. R. R. Co.

WILLIAMS, Associate Justice.—Quebe, while in the employment of the railroad company, and attempting to stop with a heavy piece of timber an engine tank moving along an inclined track, stumbled over an iron peg driven into a pathway along which he was running, and was struck upon the breast and throat by the end of the timber and fell, his head striking the ground with force. He stopped work for a few days, but, believing that he had received no injuries except those

to his throat and breast, and that they were trifling, and being so told by the surgeon of the company, he reported for re-employment. The company had a rule forbidding the re-employment of any servant who had an unsettled claim for damages against it, and its agents informed Quebe that he could not be employed unless he executed a release. Thereupon, the following instrument was executed:

CONTRACT OF SETTLEMENT.

"Know all men by these presents: That whereas, on the 3d day of May, 1901, I, the undersignd, was in the employ of the Gulf, Colorado and Santo Fe Railway Company, as carpenter, on * * * and, while so employed, received injuries as follows: Throat and breast injured by falling on a peg. And whereas, said company will not employ or retain in its employment anyone who has an unadjusted claim for damages against it, and will not promise employment to or consider anyone as an applicant for employment who has an unadjusted claim against it:

"Now, therefore, for the purpose of fully ending and determining any claim for damages that I may have against said company, and for and in consideration of the sum of $1 to me in hand paid by the said company, the receipt whereof is hereby acknowledged, it being agreed that the execution hereof will be conclusive evidence of the receipt of the same by me, and that I will never claim that the same was not paid to me by said company, and in consideration of the promise of said company to employ me for one day as carpenter at the usual rate of pay, the execution hereof being conclusive evidence that said company has made me such promise, and for such further time and in such capacity as may be satisfactory to the said company, and not longer or otherwise, I do hereby remise, release, and forever discharge said company of and from any and all manner of actions, suits, debts, and sums of money, dues, claims, and demands whatsoever, in law or equity, which I have ever had, or now have, against said company by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort. It being expressly agreed and understood that said company is not bound or obligated by these presents or otherwise (except as to said one day) to retain me in any particular kind of employment, nor for any definite time.

"In testimony whereof, I have hereunto set my hand this 8th day of May, 1901.

"W. S. QUEBE."

Quebe resumed work on the same day, and remained in the service for about four months, when he became blind and quit. The consideration of $1 was also paid to him by the company. In his action, he asserts no claim for the injury to his throat and breast, but claims that his loss of sight was caused by the blow received upon the head in falling. As to this, his contentions are: (1) that the release does not cover that injury; but, if it does (2) that it was executed without consideration; (3) that it was executed under a mistake of fact, and (4) that it was procured by fraud. Besides the questions arising on this release, there were the usual issues as to negligence, contributory negligence, assumption of risk, and proximate cause. Another prominent question was, whether or not plaintiff's loss of sight was caused by his fall, and upon this the evidence was conflicting and uncertain. The judge who tried the case submitted all of these issues, and, with reference to the release, instructed the jury that it precluded the plaintiff from recovering any damages for the injury to his throat and breast, and further as follows: "The question as to whether the plaintiff and the defendant company intended by the execution of said release to include therein injury to plaintiff's eyes is a question of fact for your determination under the terms and language of said release, construed in the light of all the evidence and circumstances in the case. If you believe that, by the terms of said instrument, construed in the light of all the evidence in this case, it was contemplated or intended by the plaintiff and the defendant company at the time of the execution of said release to release the defendant company from all injuries and damages that might result to plaintiff from said accident and injury, including injuries to his eyesight, then, in such case, you will find for the defendant company without further inquiries. On the other hand, if you believe from the evidence and the terms of said release construed in the light of all the evidence in the case that it was not contemplated by the plaintiff and the defendant nor intended by them at the time of the execution of said instrument to release the defendant company from anything except damages on account of the injury which plaintiff then claimed to have received to his

throat and breast, and that it was not intended thereby to release the defendant company from damages on account of other injuries thereby received, on account of injuries to his eyes, such as is claimed in this case, then, and in such case, said instrument would not conclude the plaintiff, and prevent him from a recovery on account of injuries to his sight, provided plaintiff is entitled to recover same under the law as contained in this charge and the evidence admitted before you." A general verdict was returned for defendant.

The leading contention of counsel for plaintiff in error is that the court should not have thus submitted to the jury the question as to the legal effect of the instrument, but should have instructed, as matter of law, that it did not embrace the injuries for which damages are now claimed. This contention raises the question as to the construction of the instrument, simply, and leaves out of view all questions as to want of consideration, mistake and fraud. We agree with the Court of Civil Appeals that, construed by its language alone, the release is sufficiently broad to embrace all damages arising from the accident specified in it, the "falling on a peg." Not only the general language of the concluding clause, but the recital of the object and purpose of the parties plainly lead to this conclusion. The reliance of the counsel in this contention is upon the principle of construction laid down in a vast number of authorities, that, where there is in a release a particular recital of the subject matter or consideration about which the parties are dealing, general language following, which purports to release all claims, is construed to have reference to the particular matter recited, and is confined to that. This is done in order to prevent surprises by which parties, when releasing one cause of action, may be made to appear to have released another. Most of the many well-considered cases in which releases were thus construed, without reference to questions of fraud and mistake, involved transactions in which the instruments showed that the releasor, while treating of one cause of action, used general language which the other party sought to apply to another and distinct cause of action.

In this case there was but one cause of action, to discharge which was the very purpose recited in the paper, and language appropriate to such purpose was used. The language of the release is not restricted to the damage to throat and breast. The

cause of the injury, that which gave rise to the cause of action for all damages resulting, the fall, is also specified, and all cause of action is then released. Properly applied, the rule of construction restricts the general language to that cause of action and would prevent its application to any other. It is doubtless true that a person having such a cause of action may make a settlement for the damages of which he is at the time conscious, reserving his right of action for any that may subsequently accrue (Bliss v. Railway, 160 Mass., 447; Och v. Railway, 31 S. W. Rep., 968), but such a settlement would be much out of the ordinary course of dealing, and is not expressed by language such as that used by these parties. No ordinary release relating to only one cause of action should be construed as splitting it up, unless the purpose is expressed in its language. In the present case, the language is inconsistent with such a purpose. Some countenance is given to the proposed construction of the instrument in question by the language of some opinions. Railway v. Artist, 60 Fed., 365.

We are not inclined to agree with the application of the rule of construction given in that case, but, whether correct or not, it cannot control here. The particular recitals in the instrument there construed of the injuries received were much more specific than those of the one before us. Every instrument must be construed by its own language, and the intention expressed in it must control; and the intention here expressed, to release a cause of action rather than to acknowledge receipt of payment for a part of the damage, can not be mistaken. We repeat that what we have thus far considered is the application of the rule of construction by which the legal meaning of the release is to be ascertained, and not the principles governing in cases where such instruments are sought to be set aside or restricted in their operation on grounds of fraud or mistake. In most of the accident cases cited by plaintiff in error in which relief was given against the general language of releases, they were attacked on the ground of mistake or fraud, and the expressions in the opinions must be understood as applying when such is the question, and not when the interpretation or construction of the language alone is under consideration. Lumley v. Railway, 76 Fed., 72; Blair v. Railway, 1 S. W. Rep., 325.

The two questions are not always kept distinct in the discussion of such cases, as they must be kept

here. They must be kept distinct here because the question of mistake *vel non* was submitted to the jury in a manner most liberal to plaintiff, and no fraud appears in the case. Any theory of mistake must involve the fact that plaintiff, in the release, did not intend to embrace any such damages as those he now claims, and whether he did or not was a question left with the jury. He asserts that the evidence conclusively shows that he did not so intend, because he had no knowledge that such injuries existed, and that such damage would ensue. The answer is that, for him to intend to release all cause of action, for prospective as well as past and present damage, it was not necessary for him to know what the future would bring to pass. It is enough if he made a binding contract by which he took the "chances of future development." Railway v. McCarty, 1 Texas Court Reporter, 401, 94 Texas, 298. As to this, the release and its recitals contained the evidence of his intention. It is not necessary for us to decide whether or not the court properly put this question to the jury; for, under the view taken of the release, its action was favorable to plaintiff, and he can not complain. Upon the subject of fraud, there was nothing to submit, had there been a request for a submission of that question. The statement made by the surgeon as to the character of plaintiff's injuries was only his medical opinion, which accorded with all that was known or believed, and was made with no purpose, so far as appears, to procure a release or other advantage. No circumstance of undue influence or overreaching is shown. So far as appears, plaintiff acted freely and voluntarily in making the settlement. The consideration was a valuable and legal one, though small. Considering the fact that the matter settled was regarded by both parties as involving no large amount, it can not be said that the smallness of the consideration, by itself, furnishes ground for disregarding the release. From the written contract and the verdict of the jury it appears that the plaintiff chose to accept what was offered and release his cause of action, and no ground for relieving him is made to appear.

The judgment should be reversed and the case dismissed.

Respectfully submitted,
JOHN F. DILLON,
DAVID D. DUNCAN,
WINSLOW S. PIERCE,
Counsel for the Railway Company.

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
GEORGE H. DASHIELL.

No. 212.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY TO DEFENDANT IN ERROR'S SUPPLEMENTAL BRIEF AND ARGUMENT.

We submit that the matters discussed in the Supplemental Brief and Argument filed by the defendant in error, by leave of Court, are irrelevant to the single issue presented to the Court for review.

In the record the only references on the trial to the release are as follows:

(1) When the release was offered in evidence the trial Judge said:

"The release will obtain as to the particular matters or injuries set out specifically in the first part of it. There will be no recovery for any injuries which are specifically set out in the release, because that release has not been set aside. Only those matters, or injuries, will be submitted to the jury which are not incorporated in the release" (Tr., p. 77).

Defendant immediately took an exception (Tr., p. 77).

(2) The Judge in his charge to the jury used the following language:

"On the question of the release of the defendants from liability for the injury sustained by plaintiff you are charged that the agreement entered into between the plaintiff and the defendant company which has been introduced in evidence is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof, to wit, injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to have been received by him, resulting in the impaired mental powers and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action and the consideration of which will be submitted to you in this charge" (Tr., p. 91).

Plaintiff, Dashiell, asked for no instructions and took no exceptions, but the defendant specially excepted to this charge (Tr., p. 94). Thus was raised the question whether or not the release by its terms included the injuries sued upon in this action. If it did not there was no error. If it did there was error for which the judgment below should be reversed and the case remanded for such further proceedings as to this Honorable Court may seem meet.

The judgment should be reversed and the case dismissed.

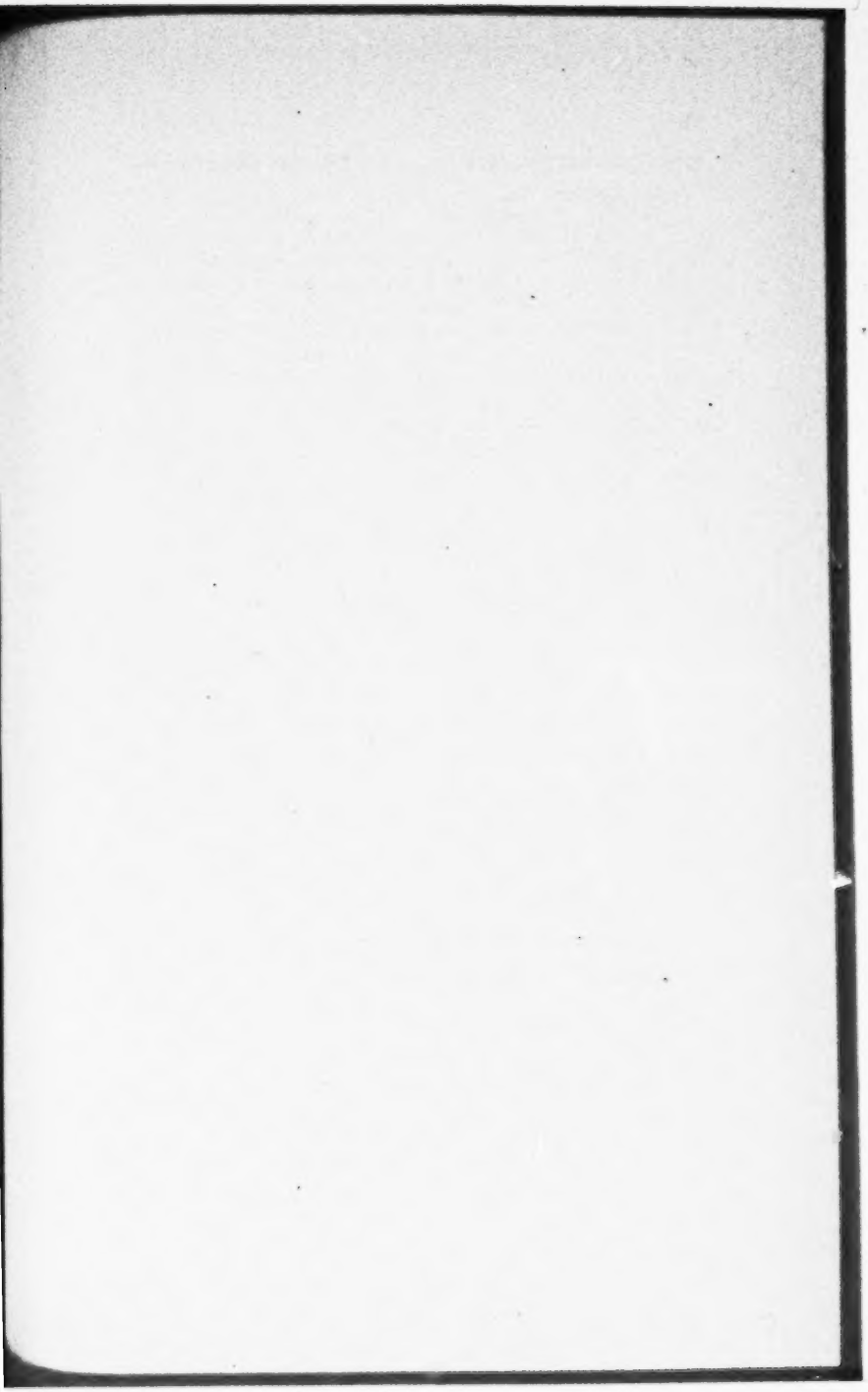
Respectfully submitted,

JOHN F. DILLON,

DAVID D. DUNCAN,

WINSLOW S. PIERCE,

Counsel for the Railway Company.



Return brief on 2nd page

IN THE

Supreme Court of the United States

No. 258.

THE TEXAS AND PACIFIC RAILWAY COMPANY,

PLAINTIFF IN ERROR,

vs.

GEORGE H. DASHIEL, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

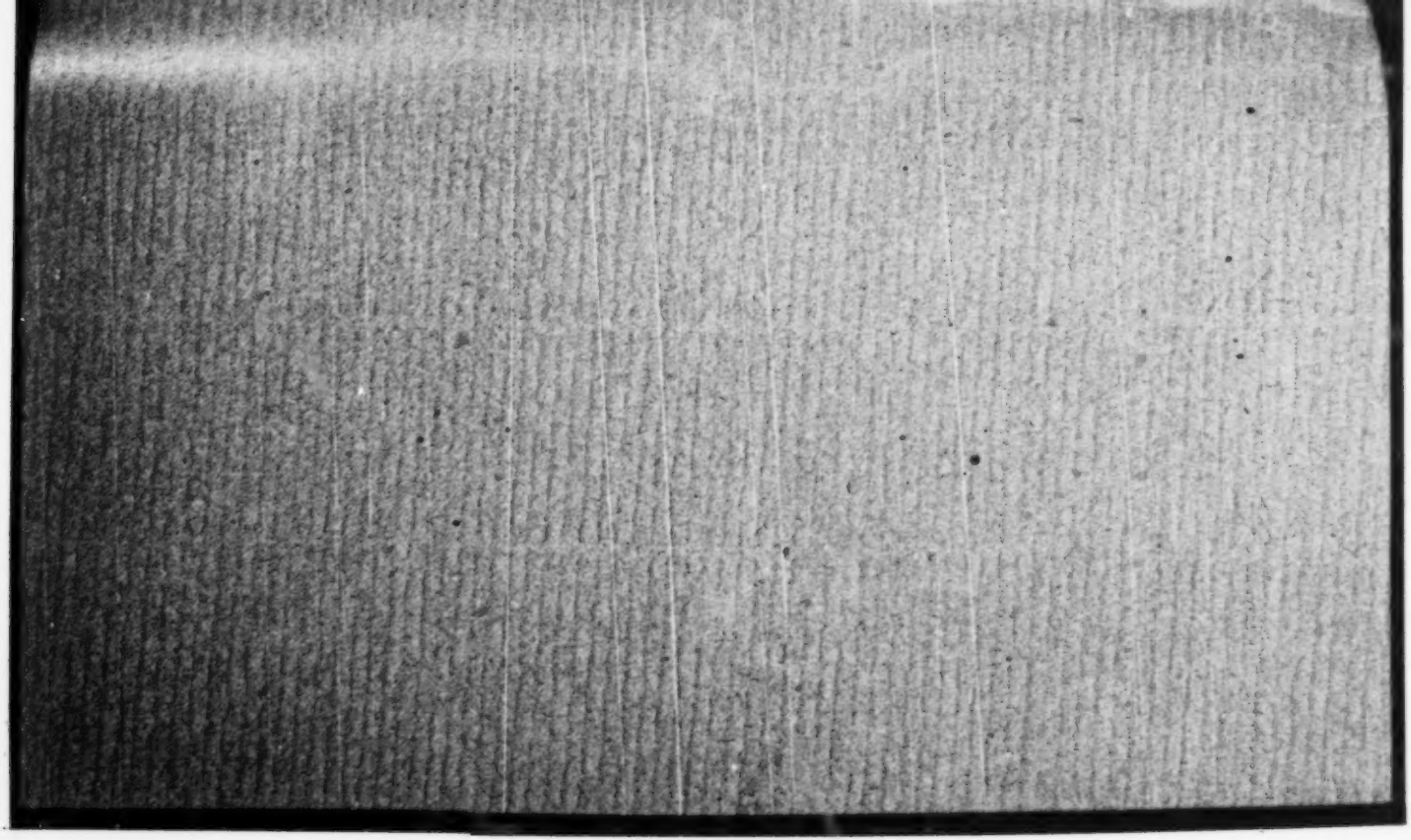
BY

ATTORNEY FOR DEFENDANT IN ERROR, GEORGE H. DASHIEL.

Ben McElwee

Attorney for G. H. Dashiel, Defendant in Error.

The A. B. Mon.e Printing House, 310 Main St., Fort Worth.



IN THE

Supreme Court of the United States.

No. 212.

THE TEXAS AND PCIFIC RAILWAY COMPANY,

PLAINTIFF IN ERROR,

VS.

GEORGE H. DASHIEL, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR

BY Ben M. Davis

ATTORNEY FOR DEFENDANT IN ERROR, GEORGE H. DASHIEL.

May it Please the Court:

Not having been favored with the brief of plaintiff in error, we ask your indulgence in presenting this as a reply to the specifications of error found in the record.

On November the 12th, 1903, this cause, on error to the Circuit Court of the United States for the Northern District of Texas, was submitted to the United States Circuit Court of Appeals, sitting at Fort Worth, Texas. (Rec., p. 104.)

Thereafterwards, on the 2nd day of February, 1904, said Court unanimously affirmed the judgment of the trial Court. (Rec., pp. 105 to 109.)

Thereafterwards plaintiff in error brought said cause to this Court by writ of error. (Rec., pp. 110-117.)

That we may properly discuss the specifications of error here presented, we state as briefly as possible the nature and result of this suit and of the defenses urged in said trial Court:

Plaintiff, by next friend, in his first amended petition, alleged that on 24th day of December, 1900, he was serving defendant as a freight train conductor and that while running such train in an easterly direction between Eastland and Ranger, he was, through the negligence of defendant and its employees, operating another train in the same direction, violently collided with by said rear train.

The careless acts and omissions of defendant charged were (1) negligence in running the rear train backward with engine on the wrong end and pointing in the wrong direction; (2) negligence in the high and dangerous speed of said rear train, under the circumstances and the manner of its operation; (3) negligence in not maintaining on the rear train at the time and place of and before the collision a sufficient watch and look-out; (4) negligence in that the regular rear brakeman of the colliding train had abandoned his post of duty and in his stead was serving a green hand unfamiliar with the road and physically incompetent for the position of head end brakeman; (5) negligence in that defendant knew, or could have known, of said incompetency, yet carelessly employed and retained said servant; (6) negligence in that said rear crew at the time of the collision were violating a rule of the company that one freight train should not follow another *closer* than five minutes in space of time. Serious, painful and permanent injuries were alleged to plaintiff's head, eyes, brain, mind, and nervous system; that he was rendered unsound of mind and incapacitated for the transaction of business matters or for performing mental or manual

labor. His damages were laid at $50,000. (Rec., pp. 2 to 5.)

Defendant answered by (1) general demurrer; (2) general denial; (3*a*) special answer alleging certain acts and omissions of Dashiel as constituting contributory negligence; (*b*) contributory neligence in his alleged failure to take proper medical treatment and in the alleged aggravation of his injuries by the use of intoxicants; (4) that if rear train employees negligently caused the collision they were Dashiel's fellow servants and he assumed the risk of their carelessness: (let us suggest here that this was the only matter of assumed risk plead;) (5) that subsequent to his injury Dashiel for $30,00 executed a release to defendant; (6) that thereafterwards he worked awhile for the company and thereby ratified the terms of the release and said instrument was pleaded in bar to all injuries set out by plaintiff. (Rec., pp. 5-7).

Plaintiff replied by a supplement (1) general demurrer; (2) special demurrer to third clause of answer because indefinite, vague, uncertain as to the negligent acts and omissions of plaintiff and because simply stating the pleader's conclusion; (3) special demurrer to the fourth clause of answer because it did not negative that plaintiff and said negligent employees were not in a common employment, were not working together at the same time and place, to a common purpose and *at the same piece of work;* (4) a special demurrer to clauses 5 and 6 of said answer because the release therein plead showed on its face, in the first clause or half thereof, that Dashiel did not undertake to acquit defendant of any injury and damage except "Bruising my body, right leg, right arm and giving me a scalp wound," these being the "*certain personal injuries sustained and of the character described,*" and further because the very general words in the last clause of said release were limited to and qualified by the very specific state-

ment of injury set out in the first part thereof and in said first part mentioned as *certain* personal injuries of the *character described;* (5) a general denial was also plead and by several pleas plaintiff alleged mental incapacity to make or ratify the pretended release, want, failure and inadequacy of consideration, mutual mistake as to the nature, extent and seriousness of his injuries at time of the alleged execution and ratification of release and that when said contract was executed the *serious* injuries herein sued for had not developed and were not thought of or contemplated by the parties when they made the release: and he further specifically plead that the general words of release in the last clause of said instrument were limited to and qualified by the specific matters of injury stated in the first thereof and incorporated into the instrument at the time it was signed. In all of said pleas relative to said release plaintiff prayed for *equitable* as well as legal relief. (Rec., p. 7-13).

Defendant by supplemental answer plead: (1) General demurrer; (2) two special exceptions; (3) general denial. (Rec., p. 13).

Upon all questions of pleading or demurrer relative to said release or other matters the trial Court withheld its judgment, (counsel for each party acquiescing in such course), until introduction of all the testimony and controlled all such matters of demurrer or pleading in the admission of the evidence and in his charges to the jury given or refused.

The verdict awarded plaintiff $7500. (Rec., p, 15). After motion for new trial was overruled, the cause was by defendant upon certain specifications of error transferred to the said Fifth Circuit Court of Appeals and there affirmed as aforesaid. (Rec., pp. 16 and 17 and Rec., pp. 95 to 109).

In brief and argument before said Court of Appeals

plaintiff in error abandoned its first, second and third assignments which are to wit: the second, third and fourth errors specified in this Court. (See brief, p. 6, on file in said Court of Appeals.) We shall not, therefore, further notice errors 2, 3 and 4 here specified. (Rec., p. 110).

It was not error for said Court of Appeals to affirm the action of the trial Court relative to the matters complained of in 10th specification of error. (Rec., p. 112).

A charge that: "If a preponderance of the evidence does not establish the fact that the plaintiffs injuries are of a permanent nature, then you will disallow any claim therefor," is misleading, confusing, and involved. Why should a jury disallow *anything* for plaintiff's injuries simply because they might believe them temporary and not permanent? If the charge meant to inform the jury that they should give nothing for the permanent injury or the permanent effects thereof, if they found the injury not permanent, then the action of the jury should have been so limited by the charge and it should not have given them a "roving commission" to cut plaintiff *wholly* off from damages both temporary and permanent simply because they might conclude in the negative relative to such permanency.

The general charge gave sufficient directions concerning permanent injury, disability therefrom and the matter of compensation therefor, and such general charge was sufficient to guarantee all the rights of both parties. (Rec., p. 94.)

Suppose this charge had been requested and given, to-wit: "If a preponderance of the evidence has established the fact that plaintiff's injuries are not of a permanent character and that the effect of said injuries is temporary, then if you find for plaintiff on the question of damages you will not allow him anything for permanent character of the injury."

Under the evidence in this record the Court certainly would not have been justified in giving a charge more favorable to plaintiff in error. And if any charge, at all, was called for on the subject complained of, the one just indicated by us would have placed, at least, a little guard about the rights of defendant in orror while the matter of his compensaiion was being considered.

The general charge of the Court fixed the burden of proof on plaintiff to make out his whole case by a preponderance of the evidence, and if defendant was not satisfied with said charge and desired an affirmative presentation of the negative side of the question, it ought to have requested a proper special charge and since the charge it asked was obnoxious and misleading no error can be predicated on its refusal.

OBSERVATIONS.

Analyzed in the light of the pleadings and evidence the refused special charge denies recovery unless the injuries are of permanent nature, whereas plaintiff was clearly entitled to recover damages for pain and suffering, and temporary damage and injury up to the time of the trial. Clearly the words "any claim therefor" referred to "injuries." Plaintiff in error in the Circuit Court of Appeals cited the case of Texas Trunk Ry. vs. Ayres, 83 Texas, 268. (Its brief in said Court, p. 42.) In the Ayres case the charge refused read: "Unless it is shown affirmatively by a fair preponderance of the evidence that plaintiff's injuries are of a permanent character, you will disallow his claim for injuries of *that character.*" (83 Texas, 269.) Hence, it seems to us that the charge was misleading, confusing and obnoxious, and was properly refused.

We submit that the record of evidence warranted a peremptory charge that plaintiff's injuries were parmanent, and that no special charge in the negative was authorized by the testimony.

We briefly quote the testimony on that issue.

Dr. Harper,(Rec. p. 37), "They," (his mother and family), "asked me about an operation. I told them I couldn't promise them *any thing*; if there was an internal depression, of course an operation might do good if done soon; however *after this long a time it is rather too much to promise.* There had been a fracture of the external table I know from the depression. There has been a fracture there, you can see it below the general surface, *in the cranium. A scalp wound* wouldn't cause that kind of a depression." On page 36 he says: "From my *examination* and the history of the case, I should say that he has *mental aberation* or what is called mild dementia. In my opinion that would render him *incapacitated* for the transaction of business matters. I base my opinion on the history of the case and the *objective symptoms*; this condition may be produced by pressure on the brain; an injury to the brain will produce headache. I also took into consideration his physical apperance; he has a heavy expression, I would call it a dull, heavy expression of the face. Extreme nervousness and inability to sleep are symptoms of mental disturbance." (Rec. p. 36.)

Dr. Frost, (Rec, pp. 29-30), testified:

"Was called to attend to Dashiel December 24, 1900. * * * He was lying on bench in depot; he was suffering from injuries to head and in a shocked condition; he had a wound on top of his head, or near the top, and the left side of his head was *bruised;* the bruise on side of his head I regarded as the worst injury; *he complained of his head and his left eye;* wound on top of his head seemed to have been made by being impinged between two hard substances; seemed like this side of his head, left side, *was bulged;* seemed like it had been pinched; there was a *depression* there; my idea was at the time that it might be twenty years before the injury developed sufficient to pro-

duce pressure on the brain—anytime between then and twenty years—in other words, *it might be progressive.* * * * Knowing the case as I do, *I do not consider him of sound mind.* The wound could have produced and probably did produce an osceous tumor or lymph formation to form some where in his head that would cause pressure to exist in the brain and produce *pain in the head.*"

Again, on cross examination:

"In fact he was in such hilarious state that he would hardly submit to an examination of his body, said he was all right, *just take care of his head*, that was all he cared for. I examined his head and found no other depression that I thought would cause trouble. The injury I found was on the side of his head; the whole side of his head *was bruised and the blood oozing;* looked like it had been caught and squeezed; there is no scar there now; I washed blood off, of course I thought it was from scalp wound until I got to dressing it and found the blood oozing from here—side of head (indicating); it was bruised and discolored." (Rec. p. 30).

Dr. Sat[illegible]ers, witness for defendant, (Rec., p. 71), testified, when examined by the Court:

"The symptoms accompanying an osceous tumor, or lypmph formation in the head or brain, are *very violent headaches and intense pains in the head.*"

Dr. Borders, (Rec., p. 32), testified:

"Was called to see Dashiel 24th June, 1901. There was a depression on left side of his head; he had received an injury and suffered from symptoms of compression of the brain. He was very nervous at the time; complained of considerable pain in the head, nervousness and inability to sleep. Gave him medicine to act on the brain; under my treatment he got a little more quiet and rested better. From my observation, examination and treatment of him would say that his mental faculties seemed somewhat im-

paired; had never examined him before injury and couldn't tell whether any change in facial expression, except his eyes were rather peculiar; one pupil was slightly dilated, the other contracted. There is a relationship between the *mental and moral faculties;* we often see that a derangement of mental faculties *interferes with the moral faculties.*"

Dr. Talbott, (Rec., pp. 34-35), testified:

"I examined him in regard to his mental condition. From my examination, I don't think he is in his own mind. I think he is suffering from a *condition of insanity;* I base that opinion on the *objective symptoms*, his general appearance and the history of the case. In my opinion he is not mentally responsible for his acts. I don't think he is in a condition to perform physical or mental labor."

Whitsitt, the druggist, (Rec. pp. 45-47), testified.

"Knew Dashiel before injured. After he was injured, and before he went to work, he would come into my store. He seemed to be *different* from what he used to be. He seemed to be abstracted and acted funny, as if he had been drinking. * * * I missed him for about a month. He came into the store one morning and seemed to be further off in his actions from his natural condition than he formerly was. He would conduct himself strangely in the store. His actions were *quite different* from what they were several months before; so much so that, while I never made any remark about his condition prior to this, his peculiar action that day brought all these things to memory. And then I asked about him."

CROSS-EXAMINED:

Missed him for about month and he came back again and acted stranger than ever, and I made up my mind not to sell him anything at all. He did not want to buy morphine or drugs of any kind, or whisky. It was

not on account of being afraid of not getting my pay, that I shut him off, but because his *actions were so peculiar.* Noticed him about three times before he went to work and once after he came back. His actions were such when he came back that it caused me to make inquiries about him. I never saw him *at any time* that I thought he was drinking."

Dr. Mullins, occulist and aurist, (Rec., pp. 28-29), testified:

"Am graduate of Bellvue Hospital, New York. Examined plaintiff's eyes three times. I put him through the different tests, by putting a card with letters of different sizes at different distances, and by also using the prismatic test. With left eye he could only see top or large letters, at a given distance, and possibly the others poorly. Put him through all the tests *known* to the profession and * * * I was satisfied he * * * could not see out of that eye. His vision in his left eye is depreciated from five-sixths to nine-tenths."

CROSS-EXAMINED.

"An injury to the nerve seat might affect the function of the brain, and also *affect the functions of the sight.* In testing his left eye as to whether defective or not, I placed a twenty degree prism, the base out, over the left eye and directed him to look at a test at twenty feet distance. The prism thus placed *throws cross angles* of vision, and there will apparently be two test cards. The one of the left is seen by the right eye and the one on the right by the left eye. I saw how Dashiel read with this test and compared same with previous tests and satisfied myself that his left vision was depreciated, as above stated."

Mrs. Dashiel, mother of plaintiff (Rec., pp. 43-44), testified: "When he went to work I was opposed to it, I thought he was not right mentally; I begged him not to

go to work; his wife insisted that he must go to work. I knew from way he talked and acted he was not all right. He didn't seem to have any control over his mind. He didn't seem to understand anything, like he was in a dazed condition biggest part of the time. Complained of head most. *Continual* pain and dizziness. Noticed difference in his appearance—dull expression in his eye. In my opinion *his mind is affected* and has been ever since the injury. He is very nervous and cannot sleep nights. I frequently see him sitting up in the bed and *holding his head.* Would speak to him and he would say his head hurt him so he *couldn't sleep.* Never heard any complaint of his eyes before he was injured."

Dr. Pring (Rec., p. 25), treated Dashiel in New Mexico in June, 1902. In his medical experience had treated and examined a number of cases of insanity and diseased or deranged minds. "I found his mind deranged, verging to insanity, because of a fracture of the skull received at some previous time." Formed his opinion after examination as to his mental organism and found his mind deranged to a considerable extent. His acts and general conversation showed his mind unbalanced. On 20th June, 1902, he was taken away and was suffering mentally and unable to take care of himself. (Rec., p. 25.)

There is a great deal of other testimony sustaining our contention that the permanency and seriousness of plaintiff.s injury is practically *undisputed.* We think it conclusively shown that the injuries were of such a character, as said by Dr. Harper, that an operation at this late day *could promise nothing* and that a peremptory instruction for plaintiff as to their permanency would have been warranted.

There was apparently no conflict upon the question of plaintiff's mental unsoundness since injury and at time of

trial and the evidence is certainly *undisputed* that since the collision he has lost an eye.

In this connection we submit:

That where the evidence shows insanity and mental derangement existent at time of and before the trial there is raised a legal presumption that such will continue, and the party contending that such condition will not be lasting has the burden to establish such fact by a preponderace of the evidence To wipe out a presumption of law or fact, the burden is not on the party who has already raised that presumption in his favor.

Bradner on Ev., p. 211, Sec. 1, says;

"As the proceeding goes on the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor." Citing:

R. R. Co. vs. Gladmon, 15 Wall., 401,406.

Second: Replying to the XV specification of error, (Rec. pp. 113-114), we urge: That neither the pleading nor evidence of the defendant in error showed him *prima facie* guilty of contributory negligence, nor did they raise even a suspicion thereof. Therefore it was proper to charge the burden of proof on said issue on plaintiff in error.

The law places the burden of proving contributory negligence on the party pleading it if there is nothing in the record making the particular case an exception.

Where the Court charges the burden on defendant to show by a preponderance of "the evidence" that

plaintiff was guilty of contributory negligence, the words "the evidence" embrace all the evidence of both parties, and submits that issue to the jury, not upon evidence offered by one side nor the other, but upon all the evidence. The jury must have understood that the burden was on defendant to show by all the evidence introduced by either party tending to prove contributory negligence and that they were not confined on that issue to any particular part of the evidence.

We think there is no substantial conflict between the Texas and Federal decisions on this question, but if there should be then in the absence of a positive statute (and Texas has no such statatute) the United States courts will decide the question as depending upon general principles, and are not required to follow the decisions of state courts.

AUTHORITIES.

Hough vs. R. R. Co., 100 U. S. Rep., pp. 213-226.

R. R. Co. vs. Horst, 95 U. S. R., p. 291.

R. R. Co. vs. Gladmon, 15 Wall., p. 401; (s. c.) 82 U. S. Rep., XXI, p. 114.

Tex. & Pac. Ry. vs. Reagan, 118 Fed. Rep., pp. 815-818.

Wharton Neg., Sec. 428, and authorities cited in note 1.

Especially see:

R. R. Co. vs. Howard, 75 S. W. R., p. 807 (late decision by Texas Supreme Court).

R. R. Co. vs. Sheider, 30 S. W. R., p. 902.

R. R. Co. vs. Long, 74 S. W. R., p. 60.

R. R. Co. vs. Buie, 73 S. W. R., p. 854.

R. R. Co. vs. Gist, 78 S. W. R., p. 859.

R. R. Co. vs. Jackson, 71 S. W. R., p. 992.

In Hough vs. R. R. Co., above cited, there was knowledge by the servant of defective, insufficient machinery and his continued use thereof, after notice to master and promise to repair. He was held not guilty, as a matter of law, of contributory negligence, and that the burden of showing him so guilty was on the company.

Elsewhere in this brief we submit our views in argument upon the question of plaintiff's freedom from even a *suspicion* of contributory negligence, and the above cited Federal and State authorities fully sustain the complained of charge, and we will not further discuss this question.

Third: Assignment of error No. VIII (Rec., pp. 111-112) complains of the refusal of a certain special charge, which in so far as the evidence warranted was fully presented in the Court's general charge on the issue of negligence and contributory negligence.

Assignment No. XVI (Rec., p. 114) is composed of assignments No. 15 and 16 (original Rec., p. 113), and is practically an insistence that there should have been directed for defendant a verdict on all points involved.

Assignment No. IX (Rec., p. 112) complains of the refusal of a charge on "assumed risk."

Assignment No. I complains of judgment of said Circuit Court of Appeals.

They all pertain substantially to the same general subject and will be treated together.

Replying to assignment No. IX., the matter of assumed risk therein suggested was wholly inapplicable to plaintiff's situation, and we urge (1) that there is not a syllable of evidence tending to show that plaintiff knew the rear train was running backward. (2) That even if the testimony tended to show that

he had such knowledge, the same could have been acquired only after the rear train came out of the curve, and was within a mile, and within less than five minutes of the front train. (3) That such being the situation, there was no reasonable opportunity for him to quit his train. (4) That to have stopped and abandoned his train under such circumstances would have been almost certain death or injury to his own and rear train crew, and might have jeopardized defendant's passengers on train No. 5, (passenger) which plaintiff was soon to meet. A special charge should always be viewed in the light of the facts and circumstances, and should never be given if too abstract, unjust and unreasonable when so viewed.

The requested charge required plaintiff to assume not only the ordinary, but the extra hazzards of the rear train operation. It cut the jury off from giving plaintiff right to assume that rear employes would operate their vehicle with proper lookout, at proper rate of speed, and not too close to him as was prohibited by said 5 minute rule. At least, such would have been the effect of said charge. In the light of the facts, the charge, if given, had been gross error, because defendant was thereby relieved from liability if plaintiff knew said matter of running backwards, whether or not defendant and said rear employees were further guilty of negligence while so operating, and independent of the more backward movement.

The effect of said charge had been to single out a

supposed isolated feature of the evidence, and thereby scarf up the eyes of the jury to other matters of negligence charged and proved against the rear employees, and intimately associated with their running backwards.

If Dashiel can be held to have assumed the risk of the train running backwards, when so operated with proper attendant care, yet when such manner of operation is accompanied by negligent lookout, excessive speed and the *admitted violation* of said 5 minutes rule, then said manner of operation became an extra hazard to him, at his post of duty, on a different piece of work, and at a different time and place. The effect of said charge was to place on him all risk as to said manner of running; made him assume all negligence attending said manner, and took from him the right to assume that, while doing a work in a dangerous manner, defendant would not associate extra negligence with such dangerous performance.

The effect of such charge had been practically to have directed a verdict for defendant.

Unless Dashiel knew of the running backwards, and also knew of said attendant negligence and extra hazards in time to have quit the service, and had a reasonable opportunity to do so, without endangering his own and the life of others, and without exposing company property to destruction or damage, then we maintain that he should not be held to have assumed either the ordinary or the extra dangers of said operation. The charge, stand-

ing unmodified, wholly disregarded such matters and was correctly refused.

AUTHORITIES.

A charge similar to one at bar, requested by same counsel, held properly refused.

See R. R. Co. vs. Eberhardt, 91 Texas, 322-324,

In which it is said: "Servant knowing of negligent manner of doing a work assumes *only* the ordinary risks," etc.

Where a servant even has to work *with or on* the instrument of injury and first discovers the defect *at time* of the injury, assumed risk doctrine not applicable.

See R. R. Co. vs. Milam, 50 S. W. R., pp. 421-422.

The Milam case also holds assumed risk and contributory negligence identical, when interposed as a defense against the master's negligence.

When in duty bound to obey, a servant does not assume a risk springing from the negligence of master or vice-master.

R. R. Co. vs. Wrenn; (Texas), 50 S. W. R., 210-212.

Burke, the vice-master of plaintiff in error, was on colliding train and knew its dangerous manner of running, and knew Dashiel was ahead with Burke's orders as to letting off section man.

That he was the company's vice principal

See Sayle's Civil Stat. Texas, Art. 4560g.

As follows: "All persons engaged in the service of any * * * corporation controlling or operating a railroad * * * the line of which shall be situated in whole or in part in this state who are entrusted by such * * * corporation with the authority of superintendence, control or command of other servants or employees of such * * * corporation or with authority to direct any other em-

ployee in the performance of any duty of such employee, are vice-principals of such * * * corporation and are not fellow servants with their co-employees." (Acts of 1897).

An employee knew a hand car was defective and knew it was being operated behind one on which he was riding. He was injured in a collision. The Court held: "Nor could it be said, we think, as a matter of law, that there was an assumption of risk by the plaintiff. * * * But the question is, did he act with the care and foresight which a person of ordinary prudence would have exercised in changing his relation to the hand car and remaining in the service?"

See R. R. Co. vs. Williams (Tex.), 34 S. W. R., p. 162.

Refused charge herein made defendant in error, as a matter of law, assume all risk on the issue in question and had practically charged him out of court.

An injured employee and a negligent employee were on a different piece of work and there was injury by collision. Charge on assumed risk not called for. See:

R. R. Co. vs. Newburne (Tex.), 58 S. W. R., pp. 542-544.

A special charge giving undue prominence to any one of several matters charged as negligence should be refused.

Contributory negligence and assumed risk on the part of one occupying plaintiff's position were questions for the jury and were not purely matters of law.

See R. R. Co. vs. Shearer (Tex.), 21 S. W. R., 136-137.

R. R. Co. vs. Thompson (Tex.), 24 S. W. R., p. 139.

A servant may recover for injuries due to master's fault, as to defects of which he had notice, if under all the circumstances a servant of ordinary prudence would,

under similar conditions, have continued in the same work under the same risk. Servant has a right to assume that his employer will exercise such *additional* care as the exigencies of the case demand. See especially:

R. R. Co. vs. Vestal, (Ky.), 49 S. W. R., pp. 204-207.

Let it be noted that the only assumed risk plead was of "fellow service" negligence, to which we urged special exception, which was practically sustained by the Court in his charge to the jury. There was no pleading upon which to base the refused charge.

See clause 4 defendant's answer, Rec., p. 6 and paragraph 2 of plaintiff's Sup. pet. Rec., p. 8 on this question.

Sayles Civ. Stat. of Tex., Art. 4560, a Statute of June 10, 1897, Session Acts, First Called Session, Twenty-fifth Legislature, provides:

"All persons who are engaged in the common service of such * * * corporation, controlling or operating a railroad * * * and who while so employed, are in the same grade of employment and are doing the same character of work or service, *and are working together at the same time and place and at the same piece of work* and to a common purpose are fellow servants," and those who do not come within said provisions are not fellow servants. It is thus apparent that no assumption of fellow service negligence could obtain in this case.

See also, R. R. Co. vs. Bohan, 47 S. W. R., p. 1054.
Mayton vs. Sonnefield, 48 S. W. R., p. 610.

We understand the rule in the Federal Courts to be, that a servant may have knowledge of a defect or danger, yet such knowledge ought to be viewed in the light of the attendant facts and circumstances, and it should not be held as a matter of

law that such knowledge makes absolute assumption of risk. A jury ought to consider such knowledge in connection with all the facts and determine whether the party exercised a caution demanded by all the circumstances. They should not be required to stop short, as a matter of law, at such knowledge, if found existent.

AUTHORITIES.

T. & P. Ry. vs. Archibald, 170 U. S., top pp. 665-675, bot. p. 1188.

R. R. Co. vs. O'Brien, 161 U. S., bot. p. 452, top pp. 767-771.

R. R. Co. vs. Babcock, 154 U. S., bot. pp. 958-962.

Kane vs. R. R. Co., 128 U. S., top p. 94, bot. pp. 339-344.

Cunard S. S. Co. vs. Carey, 119 U. S., bot. pp. 357-358.

R. R. Co. vs. Ross, 112 U. S., top pp. 377-398, bot. pp. 778-794.

Hough vs. R. R. Co., 100 U. S., top p. 213, bot. p. 612.

R. R. Co. vs. Johnson, 16 U. S., "C. C. A.," p. 331.

Shearman and Red. Neg'l, (4th Ed.), p. 315, sec. 185.

If we concede (and we do not) that Court erred in refusing said charge, yet the action was harmless and could not have affected the result, because by the almost undisputed testimony the jury were authorized to find, attending the backward running, (1) negligence as to lookout; (2) as to excessive speed; and (3) as to the *admitted* violation of said five-minute rule.

See: R. R. vs. Ross, above cited, top p. 423.

Also, Brobst vs. Brock, 10 Wall., p. 528.

In Kane vs. R. R. Co.,above cited,Judge Harlan held:

"It cannot be said that plaintiff was guilty of contributory negligence in staying upon the train, after observing that a step was missing from one of the cars over which he might pass in discharging his duties. An employee upon a railroad train, *likely to meet other train*, owes it to the public as well as his employer, not to abandon his post unnecessarily."

In R. R. Co. vs. Johnson, above cited, Judge Morrow said:

"The doctrine of the assumption of risk by an employee imports, as an *inseparable prerequisite*, complete knowledge and understanding on the part of the employee of the risk and danger, and an intelligent and full consent, express or implied, to abide the consequences."

STATEMENT.

Bearing upon the question of assumed risk and also of negligence and contributory negligence, the evidence shows: Defendant's admission that Burke, its road master, had athority to order plaintiff to carry and let off a section foreman at Eastland section house. That at Delmar, (west of Cisco,) Dashiel was so ordered. That Burke rode the colliding train from Delmar to place of collision and was himself injured. (Rec., p. 74).

It was admitted by defendant that said 5-minutes rule was proven in force at time and place of collision. (Rec., p. 74).

Also that company rule No. 2, (introduced by plaintiff as applicable to the conduct of the rear train engineer), made said engineer equally responsible with his conductor when conductors directions conflicted with rules or involved risk. (Rec., p. 74).

That it was ten miles from Cisco to Eastland. (Rec. p. 18).

That after passing Eastland a short distance there was a curve in the track and after passing curve going east track was straight for about one mile from end of curve to point of accident. (Rec., p. 18).

Engineer Haire was sidetracked at Eastland to meet Dashiel's train, but had no orders for rear train. After Dashiel's train passed, short train flipped by. Both running about eighteen miles per hour and not more than *two or three* minutes apart. Have gotten slow signals from rear end of trains, but not often, for I make it a rule not to get too close. Not the custom for work trains to run in night past stations where there is a "Y" and sidetracks with the engine to the rear of the train. When there is opportunity to turn train or engine around they usually do so. We *always* turn engine and run ahead when there is a *chance*. By pushing a train after night you are liable to run over some object *in front* of you. (Rec., pp. 22-23).

Petry said both cabooses were "torn to pieces" by the collision. That the rear train was backing fifteen or twenty miles an hour at time of collision. That he was the regular brakeman on the rear train, but that he had gone into caboose to *get warm* and Childress had taken his place and that Childress wore eye-glasses. I last saw Dashiel's train about mile before the accident. *It was moving along in easterly direction.* There were sidetracks and switches at Delmar, Cisco and Eastland.

Madison, front train engineer, witness for defendant, testified:

"That at point of collision was considerably up grade. *First time* I saw rear train was at Eastland, as we were coming through. Can't tell just how far it was behind us when we passed Eastland. *Our train never did come to a*

standstill. Would not consider it *necessary* to send a flagman back if you are running *eight miles an hour.*" (Rec., pp. 47-50.)

Kincaid, front train fireman, witness for defendant, testified:

"Don't think our train was running over ten or twelve miles an hour (at time of collision.) Was up grade at point of collision. An engineer *could not protect* forward end of a train backing up as well as he could if engine was in front. There was a "Y" at Cisco where the engine could have been turned around." (Rec., pp. 50-53.)

Berry, front train brakeman, witness for defendant, testified:

"Before we let the section man off we were running fifteen or twenty miles an hour. We slowed down when we let him off to *ten or twelve* miles an hour. Both trains were on straight track and running up hill. The angle cock applied on a train running up grade, fifteen or twenty miles an hour, air applied wide open would stop train very soon, in eight, ten or twelve car lengths. When we let section man off our train, I did not apply air fully, just touched the air *lightly.* Would not take long to apply the air and then for engineer to release it." (Rec., 55-56.)

Swick, engineer on colliding train, witness for defendant, testified:

"We were running on orders from superintendent. We left Cisco from *five to ten minutes behind front train.* We turn an engine on a turntable or "Y." There was a "Y" at Cisco. We lay at Cisco *four or five* hours. The last time I saw front train it was about a mile ahead of us, and we were running seven or ten miles an hour. Before that we were running about twenty miles an hour. If air had been turned on full on our train it would not be *long* in stopping. There was a siding at Cisco and Eastland where we *could have put our engine in front.* I saw no

signal within mile of collision from brakeman Childress. I *knew* there was a train in front. Passed through Eastland fifteen or eighteen, possibly twenty, miles an hour. If the front train was running ten or twelve miles an hour and our train six, seven or eight, *there would be no necessity for a slow signal from the front train.* When I was a mile behind this train I was running *closer* to it than *five* minutes. If I had been in front of the cars with the tender in front of me, I would have been *more able* to see the front train than I was." (Rec., pp. 56-59.)

Shea, rear train conductor, witness for defendant, testified:

"We were *several* minutes behind Dashiel when we left Cisco. After leaving Cisco we stopped at Lem. Saw him (Dashiel) about one-half mile from collision. Next I saw him we were right on him. There was a straight track and *could see his red lights.* It was a very dark night. At time of collision I was looking ahead." (Witness speaks of said five-minute rule and admits that when they were half mile behind they were closer to Dashiel than five minutes.) "We were running at time of collision about ten miles an hour. When we passed Eastland were running *eight or ten* miles an hour." (Thus, he is contradicted by both Petry and Childress, who say that speed of rear train was fifteen or twenty miles an hour at *time of collision.*) "If the front train was running over ten miles an hour, 't was going faster than we. *It was just as difficult* for men in front to see how far we were behind as for us to see how far they were in front. *My train did not stop or slacken speed before collision* and was going up hill. A train going twelve miles an hour with our number of cars, should air be applied, would stop in 150 or 200 feet. I saw Dashiel lying on ground after the collision. He complained of back and leg and blood was running down his cheek. The curve was about 100 yards from Eastland de-

pot. When we passed Eastland we were the proper distance (that is, five minutes) behind other train. Had the air been applid in emergency *at the time I discovered* we were about to collide with them, we would not have hit them *as hard as we did.*" In reply to the Court, he said, if the air had been applied when he first saw them the collision *might have been avoided or lessened in degree.*

"Dashiel told me at Cisco he was going to let a section man off at Eastland section house, and Burke, the road master was with him."

We stayed at Cisco about three hours (other witnesses say about **4 or 5** hours).

It would not take *two or three* hours at Cisco, under conditions existing there, to turn our engine in *right direction.* The first view we had of front train was *after* we turned the curve at Eastland. Could not see them as we came through Eastland. It was a *quarter of mile east* of section house to place of collision. (Rec., pp. 61-64.)

Bowles, defendant's *expert*, testified: That curve is pretty near half way between the section house and depot. He thought it would be better to run train with engine in front. He saw Deshiel often before the accident. He was a bright, intelligent railroad man. He never knew of him drinking before accident, while in service of defendant. If a train slows down, and the train following is running *at a high rate of speed*, it is the duty of the conductor to flag him. (Rec., pp. 64-65.)

We will digress a little just here to ask this question: How on earth could it be reasonably urged that Dashiel would know, or even suppose, that rear train employees would be running their vehicle at a *high rate of speed*, and especially so, in view of the *personal warning* which, at Cisco, he had given rear train conductor, in presence of Burke, that he had orders to let a man alight at Eastland

section house? This personal notice to rear employees was better warning that front train, under orders from the road master, would necessarily be stopped or slowed down, to obey those orders, and such *direct* warning to rear train employees *was better* than the use of all the lanterns or red lights on the road. Hence, we claim that the special charges refused, on the question of contributory negligence, and elsewhere herein more fully discussed, were *wholly* inapplicable to the state of facts shown by this record, and the court acted justly when he declined to *emphasize* defendant's idea on the subject to any greater extent than submitted in his general charge and in the given special charges.

Ward, defendant's superintendent, on cross-examination admitted: "When a train has slackened speed to let off section man, is given signal at once to go ahead, the conductor and brakeman go inside, brakeman coals up the fire, the train has gained its normal speed, four or five minutes have elapsed, *there would be no necessity for flagging the train* if such circumstances existed. From Putman to Baird, west of Delmar, is 17 or 18 miles and would take about an hour to run to Baird. There was "Y" at Baird where engine could have been turned, With "Y"s full of cars at Cisco it would take from an hour to hour and a half to change engine to front of train." (Remember all witnesses agree that rear train stood at Cisco from three to five hours).

Dashiel was in defendant's service eight or ten months. Before the accident he was a sober man and was considered a good, competent railroad man and was *promoted* from brakeman to conductor over some older employees. The witness further testified that with switches and sidetracks connected with the main track, an engine could not be changed to front of train without making a "flying switch." (Rec., pp. 65-69.)

Cheek, in rebuttal, illustrates the real(?) ignorance of Ward on said "flying switch" proposition. (Rec., p. 74.)

Any tribunal that ever saw a railroad, by the aid of common sense and their judicial knowledge, would find said learning(?) of Ward nothing but *intolerable* ignorance.

Another "general superintendent" Scott, gave for defendant his *valuable expert experience.* On cross examination he admitted: "That good judgment would say it better to operate an engine in front of cars than to *push*, because the engineer has control and manipulates the brakes, *and if it can be done it ought to be.* With train running eight or ten miles an hour. (estimate of speed made by some defense witnesses), and everything in good shape it is possible to stop it one hundred or one hundred and twenty-five feet. (Rec. 75.)

The Court will note that a great deal of defendant's testimony found in the record derives its chief value (?) simply from being "expert." It was a kind of "speak the speech, I pray you, trippingly o, the tongue." Where a judge may inform a jury what effect shall be given certain testimony, we submit that upon the foregoing evidence of defendant, the trial Court would have been warranted on the issue of "assumed risk," negligence and contributory negligence in directing a peremptory verdict for plaintiff.

For the court to have followed suggestions in the assignments raising those issues and made the jury to have found for defendant, had been against the great weight of defendant's own testimony and would have ignored all physical facts and circumstances around the collision.

Had defendant in error introduced *no testimony* on said issues it had required a remarkable stretch of judicial conscience to have directed a verdict for the railroad. But let us reduce to an absurdity the contention for a "directed verdict," for such is the practical meaning of

all the assignments on said issues, by adding to the above the proof adduced by plaintiff.

Shall we argue the great difficulty to develop plaintiff's cause when your Honors can note the large percentage of the witnesses who were *still on* defendant's *pay roll*. It may be noted just here that defendant failed to enlighten the jury by the presence of *fireman* on rear train (and there is no testimony of his "death," as usually accompanies such omissions). All others on both trains told what was *supposed* to be the truth about the collision.

Cheek, front train brakeman, witness for plaintiff, testified: We had passed Eastland, had started up hill; I was riding on the engine, when I discovered anything wrong; something *drove us ahead*. The engineer and I looked at the air guage: it was all right, and then pretty soon we broke in two about five cars from engine. We were running at time of the accident "about *twelve* miles an hour. Our train was not at a standstill after passing Eastland. We could find nothing but *floor* of our caboose after collision. With little extra trouble they (rear train) could have put their engine in front. Could have turned engine around at Cisco. Work trains sometimes run backwards, but it is not usual to extend their limits over *two-thirds of a division and to that time of night*. From Eastland to place of accident we were running about eighteen miles per hour and slowed up no more than the up grade, that I know of.

Engineer began working steam after passing Eastland. Had air been set or steam shut off (on front train), I undoubtedly would have noticed it. A section man would get off a train running twelve miles an hour. The *first thing* I noticed wrong with our train was *at time* of the collision. We kept up same rate of speed from Eastland to place of collision. (Rec., pp. 19-22.)

We have quoted testsmony of Haire. (Rec., pp. 22-23).

We have quoted testimony of Petry. (Rec., pp. 23-25).

Wm. Childress was brought into Court, but was not placed on stand, by defendant. As witness for plaintiff in rebuttal, he testified:

I had never been over road as brakeman *before*. *My first trip*. I wore glasses that night. When I saw train in front I gave our engineer slow signal and then *jumped off*. Can't say how many signals I gave. (It will be noted that he did not give his engineer a *stop signal*.) . Air was connected with *our engine* about *six inches* from where I stood and was *accessible to me*. No air was applied. Had air been applied our train would have slowed down or stopped. We were running about fifteen miles per hour. When Dashiel's train was quarter mile ahead and we running fifteen miles an hour, that would give me but one minute to signal. If Childress had only one minute to signal his train was running faster than fifteen miles an hour. Because every witness swore that Dashiel's train was also running. Maddison said front train was running seven, eight or ten miles an hour, Cheek twelve miles, Berry ten or twelve miles, Kincaid ten or twelve miles an hour, at time of collision. Hence, it is *self-evident* that Childress was further than one-fourth mile back when front train was seen and signals begun, or he was running at terriffic speed as the "splintered" cabooses indicated. If front train was running up grade ten or twelve miles per hour and struck by rear train running up same grade fifteen miles per hour, the collision would barely have jarred the cabooses. If front train was going up grade ten or twelve miles an hour and struck by rear train with such force as to "kindlewood" cabooses and drive front train forward, breaking it in two, there is no guess work to say the rear train was running thirty-five or forty miles per hour, probably more.

Childress further said:

A man on rear of front train could see our train coming. They were aware that our caboose was in front. (He thus states no more than a *mere conclusion* because he further says the front train was a *little east* of section house *when I first observed it.*) He ran on *some distance* after seeing the lights *before* he began to give signals. (Rec., pp. 74-76.)

If Dashiel was east of section house when his train was first observed by Childress, did he have a better chance, that cold, dark night to see the rear train through said curve than had Childress to see Dashiel's train?

Admit that Childress stated a fact, not a mere conclusion, in saying Dashiel knew rear train was coming backwards, yet such knowledge must have arisen, if at all, after the rear train came out of said curve and in time and distance must have been in close proximity to the front crew.

Defendant put in evidence Dashiel's statement to his superintendent concerning the collision. It is but fair to bind defendant by the proof therein upon the question of negligence and contributory negligence. If defendant undertakes to contradict such proof, the same should be positive and satisfactory.

"We had gone about one-half mile or more from where section foreman got off when extra ran into rear of our train *wrecking caboose*, etc. I was on rear platform of our caboose when foreman got off; gave engineer signal all right *and he kept on going and answered my signal.* We was running ten or twelve miles per hour on straight track up grade. Two extras east * * * was coming east; WE BOTH HAD SAME ORDERS." (Rec., p. 85).

Too exacting would be the man for the ordinary affairs of life who could seriously argue before court, jury or

Appellate Tribunal that a freight train running ten or twelve miles an hour, up grade, conductor knowing train to follow must climb the same hill, *that both trains had same orders* and that he, before leaving Cisco, had gone to rear conductor, in the presence of the "road master" and told him *personally* that a man was to be let off at section house—that under such conditions the front crew should "flash light" and red-lantern the road way in order to further warn those already personally informed to be on the look out while plaintiff was discharging said orders of his road master.

Plaintiff in error would hoist as a petard said statement in plaintiff's way to [redacted] recover, but thereby it is "hoist on its petard" for the statement contradicts even a "suspicion" of contributory negligence or the reasonable assumption of any risk.

Bearing upon the question of defendant's negligence involved in the above assignments and evidence and sustaining the judgment of said Court of Appeals, we cite

AUTHORITIES.

Cars pushed in front of engine. Insufficient look out and excessive speed.

See: Trin. Val. Ry. Co. vs. Stewart, 62 S. R., p. 1085.

Backing without look out, etc.

Railway Co. vs. Crowder, 64 S. W. R., p. 90.

In backing train, engineer should see that proper lookout is kept and all the crew should be immediately at their posts.

Hamilton vs. Morgan's L. & T. R. & S. S. Co. (La.), 8 So. R., p. 586.

Want of proper lookout on *backing* train, whether or not negligence, should go to the jury:

Railway Co. vs. Eitzen, 39 S. W. R., p. 625.

Railway Co. vs. Hundt, 140 Ill., p. 530.

Engine running backward, pulling cars, tender obstructing the view, no one on footboard for lookout and *apply the air* and speed excessive, company liable.

R. R. Co. vs. Goss, 72 S. W. R., p. 94.

Speed from twelve to twenty miles per hour, track sometimes obstructed by horses, *train pushed by engine which could have been turned in front.* Such operation shown to be extra dangerous. Issue of negligence should go to jury and evidence held sufficient to support judgment. See:

R. R. Co. vs. Grimm, 25 Ind. (App.), p. 494; (s. c.) 57 N. E. R., p. 640.

Proven more hazardous to operate train with coach instead of engine in front, matter of negligence should go to to the jury. See:

L. & N. Ry. Co. vs. Scott's Adm'r, 22 Ky. Law R., p. 30; (s. c.) 56 S. W. R., p. 674.

The Court's general charge (Rec., pp. 90-94), went to the limits of fairness and impartiality upon the matters in the special charge refused. Two speeial charges involving the same issue were given at request of defendant and were thereafterwards rehearsed to the jury in the general charge. (See given charges, Rec., p. 89).

To have unduly emphasized defendant's contention by repeating on the same subject all day long could have had but the effect to lead the jury away from other facts, issues and circumstances connected with the trial, such a trial would have had not even the semblance of fairness and impartiality towards plaintiff.

An instruction which repeats and thereby gives undue prominence to a special feature of the evidence, as indicating contributory negligence, should be refused.

AUTHORITIES.

R. R. Co. vs. Thompson, 21 S. W. R., p, 139.
R. R. Co. vs. Shearer, 21 S. W. R., p. 137.

As to the sixteenth assignment of error (Rec., p. 114), we suggest: The jury saw and heard the many witnesses who detailed the facts and circumstances of the collision. They watched each witness as to manner, bias, prejudice and impartiality (if any), as from his lips came the details of plaintiff's misfortune. Aided by an able arbiter between the litigants they traversed the scene of the accident, noted its occasion from every standpoint, viewed it in the light of all the surroundings. The collision and its terrible consequences to plaintiff were by them traced to defendant's negligence. While the Court was not *bound by the verdict*, yet upon motion for new trial, he held again in review all the facts and details by which the award was given, and then added his deliberate, and, we think, just and intelligent judgment, against the contention of plaintiff in error.

Thereafterwards said Court of Appeals unanimously determined that the result below was just and right.

The verdict and judgments below, we are aware, do not bind this **tribunal,** but when sixteen men have combined their judgment in the lower court's result, may we not expect the same to have much weight in reaching a decision here?

Let us direct your attention to the fact that there were submitted to the jury only two elements of damage: (1) Expenses for doctors and medicines, and (2) permanent disabilities, if any. Physical and mental pain endured and to be endured and after trial expenses to be incurred in an effort to cure were plead and abundantly sustained by testimony, yet the charge eliminated all such items from consideration. Hence, how can plaintiff in error

reasonably complain at fairness of the charge as to the items and measure of damages submitted? See our petition (Rec., pp. 2-5) and charge (Rec., pp. 93-94). Upon the question of negligence and contributory negligence the general charge was: "Upon the issue of negligence of defendant company the *burden* of proof is on plaintiff and to entitle him to recover he must show by a preponderance, or greater weight, of the evidence, that he received his injuries *substantially* as alleged, and that they were caused *by reason of the negligence of defendant.*" (Rec., pp. 91-92).

As to operating train backwards and excessive speed, jury were told they must believe from the evidence that such acts on the part of defendant constituted negligence, must further believe plaintiff was free from contributory negligence and must further believe that plaintiff was injured in the manner alleged and submitted to you. (Rec., p. 92).

As to failure of rear crew to maintain proper lookout and violating said five-minute rule, it was charged: (1) That jury must believe from the evidence that such alleged acts and omissions on part of defendant constitute negligence; (2) must believe plaintiff free of contributory negligence; (3) must believe from evidence plaintiff was injured. (Rec., pp. 92-93.) Upon the measure and amount of damages, as a preface to that matter, the jury were told: "If you find upon the *whole case* in favor of plaintiff." (Rec., p. 93,)

It does seem that one must be hypercritical to find objection to the Court's charge upon the points above indicated.

As to plaintiff's damages the award was very moderate and fully warranted by the evidence. It would be useless further to cite the testimony on question of injuries.

AUTHORITIES.

In R. R. Co. vs. Flood, 79 S. W. R. (Texas), p. 1106, for the loss of sight in one eye there was verdict for $11,000 in favor of an engineer.

Injuries to brain and mind held to warrant verdict for $20,000.

See R. R. Co. vs. Brazil, 78 Texas, p. 314.

Also, R. R. Co. vs. Brantly, 62 S. W. R., p. 94.

Jurors are the recognized triers of fact, and when to their verdict is added the deliberate judgment of trial Court and of an able Appellate Court, then this **tribunal** will hardly disturb the verdict unless a manifest injustice has been done.

See:

Ins. Co. vs. Lathrop, 111 U. S., bot. pp. 537-540.

R. R. Co. vs. Powers, 149 U. S., p. 43.

Patton vs. R. R. Co., 179 U. S., p. 363.

Sup. Lod. K. of P. vs. Beck, 180 U. S., p. 745.

OBSERVATIONS.

A little human nature, a great deal of common sense and common experience ought to be exercised in reviewing the conduct of one working under orders, at his post of duty, performing his master's business with his mind on the particular work in hand.

Abstract principles of law, disconnected from the *light* of facts and surroundings, can not reasonably solve the situation of plaintiff. His vice-principal orders him to carry and let off said foreman. Both trains at Cisco, eleven and one-half miles from the collision, are laid out from three to five hours. Dashiel walks over to Shea and in presence of roadmaster notifies him of said orders. Besides Shae and he have the same orders with same instructions thereon. Was not such act as *much caution* on part of Dashiel and as *ample warning* to the rear crew, as

if from the front train when foreman alighted had been showered the "fireworks" of a Christmas eve celebration? After receiving such personal warning, rear crew knew that Dashiel's train would necessarily stop or slow down at or near section house and could not be under full headway immediately after so doing.

Could not Dashiel also rely upon the fact that he knew that rear crew had received such information and that they must also know of his situation relative to letting the man off and of again getting under headway? He knew the rear train ought to approach place of collision, not running thirty-five or forty miles per hour, *but under control after receiving said personal notice from him.*

It is not a case where front train employees must act on the presumption that another train might follow; but a case where front conductor **knew** the other train was to follow and as a matter of *great precaution* gives a personal notice of his intended action, taking, to make the warning *doubly impressive*, the roadmaster along while so doing.

Besides rear crew leave Cisco from five to ten minutes behind Dashiel. He knew there were side tracks and switches at Eastland. Lem and Cisco where engine could have been put in front, that use of "Y" at Cisco would have turned engine around. Could he not assume that rear employees *with road master aboard*, would operate in proper manner and with some care for his and their own safety. Eighteen or twenty miles an hour is speed of front train through Eastland and front crew pass there, so says one of them, at least five minutes behind Dashiel. Berry says he simply touched the air *lightly* when man got off, plaintiff's said statement to Ward is corroborated by three witnesses on front train that the speed thereof was *never less* than ten or twelve miles an hour.

Front train was "a little east of section house when Childress *first* observed it." Hence, it is self-evident that

if Dashiel *ever* saw rear train it must have been after Childress came out of curve and saw front train. Seriously, would it not take a very willing mind to deduce from said facts even a "decent suspicion" of assumed risk, contributory negligence or the violation of any rule applicable to Dashiel's situation? He knows his train is not running less than ten or twelve miles per hour, that rear train *must climb* the same hill, that rear crew has been warned as to letting off foreman, then where comes in the common sense necessity for "torpedoes or swinging lanterns," for brakemen to leave a train speeding *ten or twelve miles* an hour to warn a crew already *fully* notified? No rule applicable to his situation was violated, nor would ordinary prudence demand more to be done by Dashiel under the circumstances.

Relative to "assumed risk" charge, *we ask in all sincerity how could defendant in error on that cold, dark night*, have "complete knowledge and understanding" that rear train was not only coming backwards, *but was also coming at excessive speed, with no proper lookout and in admitted violation of said five-minute rule?*

Will impartial justice hold him barred as a matter of law by a mere "suspicion" that he knew the isolated fact of running backwards, when all fair men will concede that unless omniscient and all-seeing in that dark time, he must have been more blinded to said other acts and omissions of rear crew than he is to-day sightless in his once good eye.

We ask your Honors especially to see:

R. R. Co. vs. Chambers, 43 S. W. R., p. 1093, (Texas).

One injured from alleged known defects assumes only the *natural* ordinary risks of the service.

See Hough vs. R. R. Co., cited above.

Servant knowing an implement *in hand* defective, not

sufficient under the facts to cast absolute assumption of risk upon him.

See R. R. Co. vs. Babcock, above cited.

An engineer knew railroad track and the dangerous country through which it passed, but was ignorant that master would not do full duty for his safety in maintaining road bed. Refusal to charge on assumed risk, held no error.

R. R. Co. vs. O'Brien, above cited.

In R. R. Co. vs. Archibald, above cited, a charge similar to one in question was asked. Court struck out certain portions and gave remainder. Injured man knew certain methods adopted by master were attended with danger. This Court said: "The employee, on other hand, is not submitted to the danger of using appliances containing such defects, because of his knowledge of the the general methods adopted by employer in carrying on his business. Employee is not compelled to pass judgment on employer's methods of business or to conclude as to their adequacy." Further, it is said: "Measured by the principles just stated, trial Court not only did not err in striking out portions of instructions asked, but in the portions given stated the law *more favorably* to plaintiff in error than was sanctioned by true legal principles."

There is not a syllable in this record tending to show knowledge by Dashiel of said running backwards except the "bald-faced" statement of Childress to that effect. (Rec., p. 75). He first saw front train after he came out of curve and was about *mile* behind. Hence stated but a conclusion that plaintiff knew said manner of operation through that darkness. Besides, he does not state at what part of the mile said knowledge was acquired, whether at *time* of collision or otherwise.

The Court may ignore but a conclusion stated, or

seeing through a palpable falsehood, may refuse a charge based, if at all, upon such conclusion or falsehood.

Concede that said charge had ample grounds in the evidence, yet, had it been just to cull out a special feature from the several concurrent negligent acts and omissions charged, hold it high before the jury and thus in effect bar plaintiff, not only as to matter singled out, but upon all other negligent acts alleged.

Has not each member of this Court traveled through rough lands"? Have you not seen mountains shoot their towering heads far above the surface? Some times the loftiest peak has a summit so far above its fellows that sight and attention is lost except as to itself. Likewise, if such charge had been given it had been a tall peak fixing the jury's attention thereon and barring a view to associate issues.

All witnesses say that it was difficult for front crew to realize, through the darkness, the situation of rear train.

Where between Cisco and place of collision can it be reasonably urged that plaintiff's situation as to knowledge became so fixed as to justify him in abandoning his train, in taking to the woods and, possibly, climbing a tree to escape a "far sighted peril" acquired in the dark time? It must have been after rear crew passed Eastland at least five minutes behind Dashiel as stated by one of that crew. What would common sense and ordinary prudence have suggested the injured man's doing if across the shadows of that cloudy night he saw the other vehicle coming, right on him, rear end foremost?

He is running under orders and is soon to meet train No. 5, laden with defendant's passengers (see statement,

Rec., p. 85). He had no chance to resign or quit the service. To have abandoned his train on that hillside had crazily destroyed defendant's property in custody of both crews and had resulted in death or injury to all on rear train, running at such high speed as to splinter both cabooses, and yet, under such circumstances, the refused charge had made him assume such rish.

Had the special charge been the law of this case, plaintiff's situation had been governed by unreasonable conditions, and the law that contains not the elements of reason and human experience should never be applied by a just tribunal.

Fourth. Assignments of errors Nos. twelve, thirteen and fourteen (Rec., p. 113) all relate to the action of the Court concerning matters connected with said release and will be considered together.

Agreement as to transcript (Rec., p. 103, Sub. 5) shows that the original release, in its *original form is to* accompany the record, that its form, purport and manner of execution may be inspected by this Court. On pages 14, 76 and 77 of record said release is copied and there are also on pages 76 and 77 of the record certain agreed explanations concerning the same.

"All the words in the above described instrument except the date and signature and except the words 'bruising my body, right leg, right arm and giving me a scalp wound,' were in print in a form *already prepared before* the execution of the release. Said words, 'bruising my body, right leg, right arm and giving me a scalp wound' were typewritten and were incorporated into the first half or clause of said release *when the same was signed and executed by Dashiel.*" (Rec., pp. 76-77.)

We request the Court also to note that Dashiel, in describing the injuries specified in said first clause, uses this

language: "I sustained *certain* personal injuries in the manner and *of the character described.*" and then he follows a specific statement and *description* of the injuries in said clause specified.

Before passing on the question of pleadings concerning *said instrument and in* order to ascertain the true intention of the parties relative to the release, and, also, to ascertain the meaning of the terms and expressions relative to the injuries in said instrument set out, the Court heard *all* evidence of both parties bearing upon the injuries received by plaintiff, and their character and seriousness as to being existent, known and developed, or otherwise, when said release agreement was executed. After so doing, the Court allowed the instrument in evidence, as shown on page 77 of record.

In his charge to the jury, as to matter of injuries, the Court eliminated from consideration every injury except "impaired mental powers and partial loss of sight in his left eye." (Rec., p. 91.)

We submit that where there are general words alone in a release they shall be taken most strongly against a releasor; but where there is a particular recital, and then general words follow, the general words shall be qualified by the particular recital.

2nd, we further urge that if the terms and expressions of an instrument are such as to render it uncertain to the court as to what was the true intention of the parties in the use of such terms and expressions, then the court has the right, and it is his duty, to hear testimony touching the matters to which said instrument relates and to give the instrument such a construction as will obviate any latent ambiguity therein and express the real intention of the parties at the time of its execution, and to

ascertain what was contemplated by them when such terms and expressions were so used.

AUTHORITIES.

Union Pac. Ry. vs. Artist, 60 Fed. Rep., pp. 365-367.

R. R. Co. vs. McCarty, 94 Tex., pp. 302-303.

Ramsden vs. Hylton, 2 Vesey, p. 304.

Lumley vs. Railway, 6 Am. and Eng. Ry. Cas. (new series), p. 81 (s. c.) 76 Fed. R. 466

Parsons on Con., Vol. 2, p. 28 (ed. pub. by Little, Brown & Co. in 1855.

Jackson vs. Stackhouse, N. Y. Com. Law Rep., Vol. 7, bot. p. 460; (s. c.) 1 Cowan, pp. 122-126.

Hill vs. Miller, 76 N. Y. Ct. of App. Rep., p. 33.

Clark vs. Woodruff, 83 N. Y. Ct. of App. Rep., pp. 520-523.

Chitty on Con., 6 Am. Ed., p. 778*a* (Title Release).

Bacon's Abr. Release, K.

Payler vs. Homevsham, 4 M. & S. p. 423, 16 R. R. p. 516.

Above in all cases 115 Fed. R. 575

General words in a release are to be limited and restrained to the particular words in the recital. See:

Stonehewer vs. Farrer, 14 L. J., Q. B., p. 122.

Lyman vs. Clark, 9 Mass., p. 234-238.

In the last cited case the Court said: "It is a general and *reasonable* rule, that more general words in an instrument shall be restrained by other expressions more limited in the same instrument."

OBSERVATIONS.

Where the general printed words are in a form already prepared and among others laid away for promiscuous use, to bind a party by the general

words instead of by the particular words and specifications inserted by himself when he signs the instrument, is but to conclude him by a "unilateral contract."

Three special exceptions to defendant's plea in bar were urged by plaintiff (Rec., pp. 8-9).

Plaintiff further urged four special answers in reply to said plea in bar (Rec., pp. 9-13).

We call your attention to the fact that counsel for plaintiff in error both in the trial Court and in brief and oral argument before said Circuit Court of Appeals relied on the Artist and McCarty cases, above cited by us. (See their brief in U. S. Cir. Ct. App., p. 53).

In the Federal Courts the Artist case and in Texas the McCarty case, we take it, were the law of the land when so urged and when this trial occurred.

Both those cases *fully sustain* our contention relative to said release.

First, in the Artist case Judge Sanborn said:

"General words alone in a release are taken most strongly against the releasor. But when there is a *particular recital* followed by general words, the latter are qualified by the recital. The Court below properly applied this to the release in this case. The general words in the last half of it are limited by the *very specific recital* of the injuries that the $150 was to be a settlement of which is contained in the first half of the release. It was the claim for these injuries, and these only, that this release discharged the company from."

The McCarty case, 94 Texas, 302-303, refers approvingly to the language of Lord Hardwicke in Ramsey vs. Hylton, above cited. It also refers approvingly to said Artist case and to the case of Lumly vs. Ry., above cited.

"This case," said the Court, "is also clearly to be dis-

tinguished from the Lumly case and the other cases on that line. In those cases the contract was neither set aside nor impaired by reason of any mistake of the parties to the relaase. *There, by a rule of construction, the operation of the release is restricted to the particulars mentioned.* Here no *particular* injuries are mentioned. Here, then, the terms of the release are not to be mistaken and the contract is not open to construction."

Both parties having urged said cases below, those courts certainly followed well *recommended* decisions in affirming our contention.

In Jackson vs. Stackhouse, above cited, it is said:

"Thus, if a release acknowldges receipt of 10 pounds and thereof acquits and discharges the person of whom it is received, *and also of all actions, debts and demands, nothing* is discharged but the 10 pounds, for the last words are limited by the first."

In Clark vs. Woodruff, above cited, the court said:

"The language of printed blanks is easily assumed to be appropriate, without careful examination, while the written words more *safely and more nearly* indicate the intention of the contracting parties."

In 2nd vol. Par. on Con., p. 28 said (Ed, 1885), is this language:

"Instruments are often used which are in part printed and in part written, that is, they are printed with blanks, which are afterwards filled up; and the question may occur to which a *preference* should be given. The general answer is to the *written* part. What is printed is intended to apply to a large class of contracts and not to anyone exclusively; the blanks are left purposely that the special statements or provisions should be inserted, which belong to this contract and not to others and thus discriminate this from others.

It is reasonable to suppose that *the intention of the par-*

ties was more clearly given to those phrases selected by themselves, and which express the *especial particulars* of their own contract, than to those more general expressions which belong to all contracts of this class."

Bacon's Abr., above cited, says that where there are general words all alone in a deed of release, they shall be taken most strongly against the releasor: but where there is a particular recital in a deed and then general words follow, the general words shall be qualified by the particular recital."

In 2 Roll. Abr., 409, there is cited a case, which says: "If a man should receive £10, and give a receipt for it, and doth thereby acquit and release the person of *all actions, debts, duties und demands, nothing is released* but the £10; because the last words must be limited by those foregoing."

Permit, again, the suggestion that his Honor before ruling upon matters pertaining to, and in construing, said release first saw, heard and considered all thiugs in the testimony relative to the same, in order that he might the more clearly and justly determine the *contemplation and intention* of the parties involved in the terms and expressions of the instrument. Such action by the Court is shown by the whole record herein. His judgment thereon will, no doubt, be given great weight, by this **Tribunal** while passing, somewhat at "long-distance," on this question, especially when you consider that the trial Court submitted to the jury no matter of injury except those to brain and eye.

Specification of error No. 5 (Rec., pp. 110-111) complains that there was not a verdict directed for defendant.

Specification No. 6 (Rec., p. 111) urges that if Dashiel violated rules of the company, that he was guilty of negligence as a matter of law and thereby barred of recovery.

Specifications Nos. 7 and 11 (Rec., pp. 111-113) urge

that the Court should have repeated the submission in his general charge and in the requests granted at the instance of defendant whereby the jury were told that if Dashiel violated said rules, and that in so doing his conduct was not that of an ordinarily prudent person in the exercise of reasonable care under the circumstances, he could not recover.

As all said assignments substantially relate to same general subject we will treat them together.

FIRST PROPOSITION

IN REPLY TO SAID SPECIFICATIONS.

When a request for instructions refused is in conflict with the propositions of law contained in a request for instructions given at the instance of a complaining party, said request should be denied. It is improper to give conflicting requested instructions.

AUTHORITIES.

Tracey vs. Tuffly, 134 U. S., bot. p. 886-887.

SECOND PROPOSITION

UNDER FOREGOING.

When a party invites a court to grant a request for instructions not as favorable to him as the law would warrant, he is in no position to complain.

When a party invites a court to instruct certain propositions upon a supposed issue and the court accepts the invitation and gives the request, and thereafterwards substantially follows in his general charge the propositions in such request, the party should not be heard to complain of the court's gen-

eral charge on the subject, nor of the refusal to give other charges conflicting with the propositions in the granted request.

AUTHORITIES.

Max. Land Grant Co. vs. Dawson, 151 U. S., top p. 606, bot. p. 285.

THIRD PROPOTITION

UNDER FOREGOING SPECIFICATIONS.

Where a party requests an instruction specifying certain proposed acts and omissions of his adversary and therein incorporates the proposition that if said acts and omissions were not those of an ordinarily prudent person under the circumstances and are found to be the proximate cause of an injury, then to find for the party requesting; and where he requests practically the same instruction but leaves out the proposition that the jury may find the existence *vel non* of ordinary care under the circumstances; in other words, that said alleged acts and omissions, as a matter of law, constitute a bar to recovery, then the Court, having granted the request to charge in the first instance, and having substantially followed same in his general charge on the subject, may properly decline to submit said request containing a conflicting proposition of law.

AUTHORITIES.

Island & S. C. Co. vs. Tolson, 139 U. S., bot. p. 272.
So. Pac. Ry. Co. vs. Hall, 100 Fed. R., p. 760.

FOURTH PROPOSITION

UNDER SAID SPECIFICATIONS.

Where the pleadings of a party do not put in issue the violation of a rule, nor even of a usage and custom, but merely states certain acts and omissions as constituting contributory negligence and alleging that negligence to be a proximate cause of the injury, then said rules have no place at the trial except to illustrate, if they do illustrate, by way of evidence, said negligent acts and omissions, and it would be improper for the Court, either by general or requested instruction, to go beyond said pleadings and charge that a violation of said rule is a *negligence per se*.

Further: Evidence on an issue not raised by the pleadings involved at the hearing will not be considered by an Appellate Court.

AUTHORITIES.

Patton vs. Taylor, 7 How., pp. 158-159.

FIFTH PROPOSITION

UNDER FOREGOING SPECIFICATIONS.

Where the rule whose alleged violation is relied on as constituting *negligence per se*, does not specify any acts, conduct or omissions, the breach of which shall constitute its violation, but contains simply the broad statement that a certain supposition shall be indulged by those operating trains, and where the party assigning error has not plead the rule nor its violation, nor what constitutes its violation and where the great preponderance of, if not the undis-

puted testimony, shows no act or omission of the injured person not usual and customary, and not in accord with ordinary prudence under the circumstances, then the Court should refuse to charge either generally or upon request concerning said violation. The jury should at least be allowed to say whether the doing of the acts and omitting the things alleged against plaintiff, at a time and place when the undisputed testimony showed no rule applicable and no violation thereof, were in keeping with ordinary prudence under the circumstances.

AUTHORITIES.

U. P, Ry. Co. vs. Poirier, I67 U. S. bot, pp. 73-75.

This case substantially holds that whether or not there was a rule applicable, and whether or not there was its violation, depends upon a construction in the *light* of the facts, surroundings and exigencies. This was a rear end collision case, some facts of which relative to rules and otherwise were quite similar to the case at bar.

SIXTH PROPOSITION.

UNDER SAID SPECIFICATIONS.

Even could any view of the evidence tend to show that there was a rule applicable to plaintiff's situation and that the question of its violation was tended to be raised, and that as a matter of law he was barred of recovery, yet defendant would not be exonerated if the evidence further shows that defendant by the exercise of reasonable care and prudence, could have avoided the consequences of plaintiff's negligence, if any.

AUTHORITIES.

I. & S. C. Co. vs. Tolson. 139 U. S. bot. pp. 272-273.
Gr. T. R. R. Co. vs. Ives, 144 U. S. bot. p. 493.
Tex. & Pac. Ry. Co. vs. Nolan, 62 Eed. R., p. 532.
Chic. & C. Ry. Co., vs. Chambers, 68 Fed. R., pp. 148-152.
Balt. & C. Ry. Co. vs. Hellenthal, 88 Fed. R., pp. 116-121.

SEVENTH PROPOSITION.

UNDER FOREGOING SPECIFICATIONS,

Where a train is operated wrong end foremost, without lookout, at excessive speed and in admitted violation of defendant's five minute rule, in the same direction of another train, *known to be in front*, there exists such a want of supervision and management of the vehicle as to be dangerous in itself and is, of itself, evidence of negligence.

AUTHORITIES.

I. & S. C. Co: vs. Tolson, 139 U. S. bot. p. 271.

EIGHTH PROPOSITION.

UNDER FOREGOING SPECIFICATIONS.

Where the general charge on a subject is in accord with a request for instructions given, and fully covers the ground in so far as the evidence reasonably warrants, further requests should be refused.

It is not the duty of the court to instruct where the instructions demanded assume a theory of fact *unsupported* by the evidence, or *contradict* the evidence.

AUTHORITIES.

As to first paragraph above:

Klein vs. Russel, 86 U. S., bot. pp. 124-125

As to second paragraph;

R. R. Co. vs. Horst, 93 U. S., bot. pp. 889-900.

NINTH PROPOSITION.

UNDER FOREGOING SPECIFICATIONS.

Where the transcript shows the general instructions on a subject consistent with a special request for instructions given at the instance of a complaining party, and especially where the record shows that the charge was not excepted to in the particulars complained of while the jury were at bar, and further, the transcript shows that on motion for new trial no errors were urged to the charge in the particulars complained of on appeal, then an appellate Court will not review said charge.

AUTHORITIES.

Phelps vs. Mayer, 15 How., p. 161.
Barton vs. Forsyth, 20 How., p. 533.
Tucker vs. U. S., 151 U. S., p. 170.
Humes vs. U. S., 170 U. S., p. 212.

TENTH PROPOSITION

UNDER SAID SPECIFICATIONS.

The doctrine in Texas on the question of rule violation is that when there is no statute fixing the duty, it is for the jury to say whether or not either party failed to exercise such care in the particulars charged as would have been exercised by a person

of ordinary care under the circumstances, and it is error for the Court to charge that any particular state of facts constitutes negligence in the absence of a statute so declaring, and especially should rules or customs not be given the effect of a statute when the same are offered as mere evidence of negligence, *vel non*, and are not pleaded in bar to recovery.

AUTHORITIES.

R. R. Co. vs. Harris, 51 S. W. R., pp. 864-865.

We ask your attention, in this connection, to R. R. Co. vs. Pitts, 42 S. W. R., p. 260, in which a rule was offered with certain acts and omissions therein specified, the violation of which were prohibited with an addendum of "all similar imprudences." (The one at bar specifies *nothing*, but *vaguely* states that trains shall be run under the "*supposition*," etc.). The Court said: "We think the rule was *irrelevant*, as it does not appear that plaintiff has done any act prohibited by it. The clause in regard to imprudence does not determine what acts other than those instanced are imprudent. *That* the evidence must show, and the Court submitted to the jury whether or not plaintiff had acted imprudently. If he was not imprudent, the rule did not apply."

Under this proposition we also invite your attention to Ry. Co. vs. Hiltner (Ky.), 60 S. W. R., p. 5, a collision case, which we think specially applicable, in view of the fact that the Court's general charge on the subject under discussion almost literally follows defendant's plea of contributory negligence, and was practically a transcript of the request given at the instance of defendant.

The Court said: "So far as we are aware, an unsuccessful litigant has never procured a reversal of a case

because the Court gave an instruction to the jury upon a given subject in the exact terms asked by him." Held that one can not assign for error an erroneous instruction obtained on his own application. How much less is the defendant entitled to a reversal in this case, when he got the instruction which he moved the Court to give on the subject of contributory negligence?

STATEMENT AND ARGUMENT.

The status of the record as to pleading, general and special charges given and the evidence adduced, did not authorize the Court to grant the requests for instructions on the subject of rule violations and the general and special charges given were, under the evidence, far more favorable to plaintiff in error than it had a right to expect.

Defensive pleading set out no rule nor its violation. It merely stated certain alleged acts and omissions by Dashiel, said they were negligent and as such proximately caused the injury. (Rec., pp. 6-7). Rule No. 13 (Rec.. p. 87), in so far as authorizing *any* general or special charge, has no place in the record, because there is no testimony that Dashiel's train ever stopped.

At request of defendant the Court gave the following charge: "In determining the question of *the negligence of Dashiel,* it is your duty to take into consideration the facts surrounding the situation. You should take into consideration the fact that he knew, or ought to have acted upon the presumption that a train was following or liable to be following him, and the fact that he had caused the speed of his train to be lessened, and the position and place of the

train, AND FROM ALL THESE FACTS DETERMINE WHETHER OR NOT A REASONABLY PRUDENT PERSON IN THE EXERCISE OF ORDINARY CARE WOULD, BY SOME PROPER SIGNAL, HAVE NOTIFIED THOSE UPON THE REAR TRAIN OF THIS FACT. It was the duty of Dashiel to use reasonable care to protect his train, and if he failed in this respect and such failure caused and contributed to the accident, that is to say, but for such failure on his part, the accident would not have occurred, then they will find for the defendant, even though there was negligence on the part of those upon the rear train." (Rec , p. 89).

If we parallel this charge with said plea on the subject, we find it substantially a copy thereof. If we also parallel the Court's general charge on the subject (Rec., p. 93), we find same to be practically a transcript of defendant's pleading and of its given request.

The Court also charged (Rec., p. 93): "If proper regulations have been established by the company it is relieved from liability for injuries resulting from a violation of the rules by an employee when the injury is the direct and proximate result of such violation, but not otherwise."

We ask your attention to the fact that defendant, while the jury were at bar, suggested to his Honor no exception to the charge upon the question under discussion. (Rec., pp. 94-95).

In its motion for new trial plaintiff in error, urged no such objections. (Rec., pp. 16-17).

Rule 14, Rec., p. 87, states in vague indefinite lan-

guage, that trainmen shall run under the supposition that another train follows. When it became necessary for defendant to interpolate said rule by the acts and things to be done by the trainmen, while indulging said supposition, and when the acts and things done by Dashiel, under the supposition or knowledge that a train followed, were consistent with ordinary care and prudence, then the rule could have no application in so far as demanding a general or special charge on the subject of rule violation.

The evidence shows that no act or omission of Dashiel was inconsistent with ordinary care under the circumstances, that his conduct, supposing or knowing a train to be following, was all that ordinary prudence would demand; that he was not guilty of violating said rule 14, and that there was not sufficient evidence tending to show him so guilty to authorize a charge thereon.

Berry, witness for defendant, testified: "I was *just passing section house* when I turned on the air; foreman got off a little this side of the section house; Dashiel told me he had a section man to let off there, gave signals to engineer; he didn't take the signals and I touched the air *lightly*. This slowed down the train, he says, to ten or twelve miles an hour, and that train was running before that fifteen or twenty miles an hour. As defendant relies upon this witness to establish contributory negligence, we urge that the train is proven to be running by him fifteen miles an hour before he touched the air, and that it only slowed down to twelve, in other words slacked its speed just to extent of 1-5. He further says: "I suppose it was very near 1-2 mile from place of accident to the section house. After I got back in caboose I put coal in the

stove, that took *four or five minutes.* Track was straight and both trains going up hill. (Rec., pp. 55-56.)

We ask the Court to note that the train slackened speed only to ten or twelye miles an hour. This witness says: "Foreman got off a little this side of section house." He further says: "I suppose it was very near one-half mile from place of accident to section house." Other witnesses say that speed of train at time of collision was from ten to twelve miles per hour. We have then a train going ten or twelve miles per hour for a space of four or five minutes after section man alights until the collision. Then it must have been a *very little east* of section house, according to testimony of this defense witness, where the foreman alighted.

Kincaid, another defense witness, states on cross-examination: "It was *not very far* from the wreck to the section house. (Rec., p. 52.) At time of collision I don't think our train was running *over ten or twelve miles* an hour." (Rec., p. 53.)

Madison (Rec., pp. 47-50,) was the most favorable witness for defendant, and his testimony was so contradictory of every other witness and so contradictory of itself that it was entitled to but little, if any, credit. On page 47 (Rec.) he says: "When I got the go ahead signal, we were running about eight miles, I suppose." This was not quite strong enough for *defensive* purposes, and on same page of record he says: "I was running probably six or seven miles an hour." On same and next page he further says: From time air was turned on until the collision, it must have been *five, six or seven* minntes. (Which?) On page 48 he also says: "If a train '*breaks down*' between stations it is the duty of the conductor to send back a breakman to protect the train; if another train is following, conductor can give them a signal to stop or slow down." (Please note that there is not a *syllable* in

the record even tending to show that Dashiel's train had *broken down*, or was even in the neighborhood of so doing.) On page 49 he says: "I think *probably* (?) we were running seven miles per hour at time of collision. On same page he says: I last saw rear train in neighborhood of a mile and a half west of Eastland, and the first time I saw it was at Eastland."

On pages 49-50 he says: After the signal was given, I suppose we run about *three-quarters* of a mile before collision occurred." Seeing this not good for defense, he says, *No*, he don't believe this true, but that something else is better. He further says, page 50: "When air is applied in case of that kind and you have to start up, and your train is slowed down, there is more or less danger of its breaking in two; *that is the reason it is necessary to send a flagman back.* Man with lantern at night is called flagman. *I would not consider it necessary to send a flagman back if you are running eight miles an hour.*

Defendant put in evidence statement of Dashiel to his superintendent. (Rec., p. 85.) Therein he states that "*we were running ten or twelve miles per hour on straight track up grade.*" Thus corroborating Berry, Kincaid and Cheek as to speed of train.

The foregoing is all the evidence upon which defendant could rely to support its plea of contributory negligence. Would an impartial, or if you please, even a critical mind, hold Dashiel violating said rule in declining to swing lanters across the track, "bomshell" the rails with torpedoes, or send panting "flagman" back when his train was running twelve miles an hour, and when Berry says its speed was only lowered from fiteen down to twelve miles per hour? Especially can it be so held, when Madison says it is *not necessary* to send a flagman back *if your train is running eight* miles an hour, and when it is remembered that Dashiel at Cisco tells rear conductor a section

man is to be let off, thus personally inviting him to be on the lookout? Under the situation, as thus developed, would fairness suggest that said rule should be interpolated by actions and precautions on part of the injured man any more careful and thoughtful, in order that he might fall without the precinct of rule violation and contributory negligence? To urge that torpedo bombardments, swinging lanterns and "Christmas eve flashligts" should apply to his *afore-notified* situation and his speed of train, as sworn to by defense witnesses, it seems to us a glaring absurdity, and if such action on his part was not requisite, then said rule was inapplicable and the Court's charge on the subject was much more favorable to plaintiff in error than it had a right to demand.

But plaintiff's testimony, supplemented by other than above defense witnesses, illustrates the conduct of Dashiel to have been all that prudence and care could have demanded of ordinary mortal.

Cheek, witness for plaintiff, said he was riding on the engine, head brakeman. Had passed Eastland and started up hill, when something drove us ahead; broke into about five cars from engine. We were running at time of accident about twelve miles per hour. (Rec., p. 19).

When we left Cisco we ran at a rate of about eighteen miles an hour, and after passing Eastland to time of accident, did not *slow up any more than the up grade* that I know of. Didn't make any perceptible decrease in speed from Eastland to place of accident, that I noticed.

If the air had been set or steam shut off I would undoubtedly have noticed it. (Rec., p. 20).

The first thing he noticed wrong with his train, after leaving Cisco, was when the train gave a sudden start forward and then a jerk, and then broke in two, which was *at time of collision.* (Rec., p. 22). He further says:

"We could not find anything of our caboose *but the floor.*"

Wm. Petry, witness for plaintiff, testified: "When I last saw Dashiel's train, about a mile before the accident, *it was moving along in an easterly direction.* Our train backing about fifteen or twenty miles an hour at time of collision. (Rec., pp. 23-24).

Swick. witness for defendant, said: "At time of the accident we were running about seven to ten (which?) miles an hour: we were going up grade." (Rec., p. 58).

Is it possible we have all been dreaming about this collision? The Court, jury, lawyers, etc., connected with that trial may wake up before long and find themselves wearing "Rip VanWinkle" whiskers, that is, if Swick told the "whole (?) truth."

He further says: "If the front train was running 10 or 12 miles an hour, and our train 6, 7 or 8 miles an hour there would be *no necessity for a slow signal from front train.*" Thus, does not its own witness make defendant's *supposable* rule of conduct inapplicable to plaintiff's situation? (Rec., p. 58).

Defendant offered in evidence the letter of plaintiff to his superintendent concerning the collision, in which he says: "*We were running 10 or 12 miles an hour on straight track, up-grade; we had four red lights on rear of our caboose, all burning good.*" (Rec., p. 85).

Ward, defendant's superintendent, testified: "If train should *stop* it would be duty of the conductor to direct flagman to go back with red lantern or torpedoes and warn approaching train." (Remember, no witness swore train ever "*stopped.*") "In event train slowed down and did not come to stop he *generally* directs his flagman to stand on the platform and see that rear of train is protected." (Rec., pp. 67-68).

On cross-examination he said: "When a train has slackened its speed, say to let a section man off, and there is given a signal at once to go ahead, conductor and brakeman go into the caboose; brakeman puts coal on the fire, the train has gained its normal speed, *four or five* minutes having elapsed, *there would be no necessity for flagging the train if such circumstances existed.*" (Rec., p. 68). Please bear in mind that defense witness, Berry, swore that he merely touched the air *lightly* when foreman alighted, that his train lessened its speed from 15 down to 12 miles an hour, or only to the extent of one-fifth. Also, that defense witness, Kincaid, said at time of collision front train was running ten or twelve miles an hour; that Berry said four or five minutes had elapsed from time foreman got off till time of collision. That defendant proved by said letter of Dashiel that his train at time of collision was running ten or twelve miles an hour on straight track.

We ask you in this connection to note that Cheek, head brakeman on front train, said: "After passing Eastland to place of accident did not *slow up any more than the up grade*, that I know of. Didn't make any *perceptible decrease* in the speed from Eastland to place of accident, that I noticed." (Rec., p. 20.)

Thus it seems apparent that under the conditions existent, defendant's superintendent suggests the absurdity of the rule in question being at all applicable to plaintiff's situation. In other words, that if the speed of front train, the place of collision and the attending circumstances showed that Dashiel did no act, nor omitted any thing requisite of an ordinarily prudent person so situated, then the rule, even interpolated as aforesaid, should not be deemed violated by him.

Shea, conductor on rear train, like Schwick in many respects, so contradicts himself, and in fear of not putting the facts strong enough for defendant, is so much im-

peached by all other witnesses and the circumstances of the collision, in several particulars, as to render the *shaded* part of his testimony unworthy of belief.

But he says something that makes the contention of plaintiff in error that Dashiel on the occasion acted otherwise than with ordinary care, simply preposterous.

In speaking of the necessity for signals and flagmen, he says: "When a train is running between stations, the conductor should protect his train from following trains in event it should happen that he should have to *stop*. Where a train is running between stations and it becomes necessary to stop or slow down for any purpose, and a train is following, it is the duty of the conductor to send a *flagman back* to warn approaching train (of what?) that he is *stopping or about to stop*." (Rec., pp. 61-62.) His said interpolation of the rule, is thus seen to be based on a theory of fact that has no existence in the testimony. Plaintiff's said letter, corroborated by Kincaid, Berry and Cheek, we think renders it indisputable that his train neither *stopped* nor *was about to stop*.

Maddison, front train engineer, puts the probable speed of his train at eight miles an hour. While Cheek says that there was no *perceptible decrease* in the speed except in so far as the natural and ordinary up-grade decrease. Besides, Shea says at time of accident we were running about ten miles an hour, and when we passed through Eastland we were running eight or ten miles an hour, (thus contradicting Schwick, who says they passed that point at twenty miles an hour, and every other witness says that speed through there was from fifteen to twenty miles an hour). Shea further said: "We hadn't increased or diminished our speed much. We were not running fifteen or twenty miles an hour at time of accident." (Rec., p. 62.) (Thus contradicting both his brakemen, who say it was from fifteen to twenty miles an hour.)

Shea's train going ten miles an hour, or even more, there was no necessity on earth, according to Schwick, Maddison and Ward for the train in front, running from ten to twelve miles an hour to "flashlight its end and sky-rocket" the roadway, even had plaintiff not taken the extra pains and caution personally to tell Shea at Cisco that Burke, roadmaster, had ordered him to carry and let off the section man, so that Shea could be on the look-out for front train.

Would not impartial justice declare this act of Dashiel fully commensurate with the demands of ordinary prudence? The very best notice to rear train that there was to be a section man let off was personally given to its conductor. When the speed of Dashiel's train is shown by practically all the evidence to have lessened not to a greater extent than one-fifth at any time before the collision; when he knew he had, even under the most exacting demands of said rule, done an act which all fair-minds ought to concede the greatest possible caution on his part and the best warning to the rear crew, the personal notice so given; when he knew said rear crew had to go up the collision hill, and that, too, with said personal warning in their minds, then we ask your Honors, in all candor and sincerity, did he not do as much for the protection of his own and rear train as the strictest obedience to said rule would demand of any one under the circumstances? If so, then the evidence neither shows nor tends to show any violation of rules, and such being the status of the case, his Honor by both the general and special charges given on the subject, submitted the matter far more faforably to plaintiff in error than it could reasonably have demanded, even had said general charge been properly excepted to and complained of, and even had said special charge on the subject not been given in the language requested? He violated no rule when he *knew* that Shea's

train was to follow and took personal precaution to warn Shea: "You be on look out for my train; Burke has ordered me to let off section man."

On page 62 of record Shea says: "MR. DASHIEL TOLD ME AT CISCO THAT HE WAS GOING TO LET OFF A SECTION MAN AT EASTLAND SECTION HOUSE, AND MR. BURKE, ROADMASTER, WAS WITH HIM. The section house is about a quarter of a mile west of where the accident occurred."

Had the evidence shown Dashiel violating a rule and guilty of contributory negligence, yet if employees on rear train might by the exercise of reasonable care in the premises, have avoided the collision and injury, then they were guilty of negligence in not so doing, and their negligence may be regarded as the last, direct, efficient and proximate cause of the injury.

As we understand the authorities cited under our proposition above on this question, it makes no difference whether or not the pleadings of the injured man allege, in reply to contributory negligence, said last negligenee as the proximate cause of the injury, especially when the undisputed testimony shows defendant's negligence the last and most proximate negligence.

Defendant at the trial recognized the above modification of the doctrine of negligence and contributory negligence, in the latter part of said request given. (Rec., p. 89). "It was the Duty of Dashiel to use reasonable care to protect his train, and if he failed in this respect, *and such failure caused and contributed to the accident, that is to say, but for such failure on his part, the accident would not have occured, then they will find for the defendant, etc.*"

Under this requested charge, the jury had a right to

say whether or not the said last negligence of rear employees was the proximate cause af plaintiff's injury.

We submit, that no difference how many signals or swinging lanterns had reddened the rear end of front train, whether it was speeding ten or twelve miles an hour or at a greater or less rate, or actually at a standstill, yet this collision would have occured in any event and that no difference what the situation of front train was, had the rear employees exercised even *half ordinary* care in the premises the collision could have been averted.

First. As to conduct of Swick, engineer of rear train.

Rule No. 2 (Rec., p. 74) was introduced as applicable to him. "All trains will be run under directions of conductors except where their directions conflict with rules, *or involves risk*, in which case the engineer will be held *equally responsible.*" We think every witness who spoke on the subject said that running a freight train backwards in the dark time, with engine on wrong end and pointing in wrong direction involved more risk than if operated in regular manner.

Swick says (Rec., p. 57), if air had been turned on his train by caboose brakeman it would have slowed up or stopped the train. If turned on full it would not be *long* stopping. On page 58 he says:

"I saw the train about *a mile before* the collision, *that is the last time I saw it.* I saw no signal between that time and time of collision from rear brakeman, Childress. I *knew* there was a train in front of us. It is requisite that I should be on the safe side and keep a *vigilant lookout ahead.* I had appliances on engine by which I could have *readily stopped* the train. If I had been in front of cars with the tender in front of me, *I would have been more able to see the front train than I was.*"

Seriously, what will this Court think of a man, when measured beside ordinary care, who will operate his train

wrong end foremost, admitting that he *knows* another train is *in front*, his engine and face in wrong direction, who for a mile before collision and in point of time four minutes, according to speed stated by Childress, and for a longer time according to his own statement of speed, never looks back to see over or into what he is running or about to run nor to catch the signals of Childress, if given, as hereinafter stated.

We suggest that if a "rainbow" of signals had accompanied front caboose, that vigilant engineer had never seen them during that mile of his incaution. The record does not show Dashiel laid off during *one moment* for any contributory negligence, but it does show (Rec., p. 58) this careful (?) engineer no longer in defendant's operating department. Were not the jury warranted by the lips of this witness in convicting defendant of a *last negligence* as the proximate cause of the injury?

Wm. Childress was serving as head brakeman while the regular man, Petry, was in the caboose warming. Let's see if collision could have been averted after he *saw* that rear train was running too fast toward and near to front train.

"When I saw train in front of us I gave our engineer a signal; I gave him a *slow signal*, and then *proceeded to jump off*. Can't say how many signals I gave. Our train equipped with air down at end of car—that is the air appliances. *It was about six inches from where I was standing, accessible to me and connected with the engine.* I did not apply the air. If engineer had applied it train would have slowed down or stopped. At time of collision we were running 15 miles an hour." (Rec., pp. 74-76). A jury of practical men no doubt would reason that after this "vigilant" brakeman discovered the necessity for action he might, by exercising any kind of care and foresight, have not only given signals to his engineer, but also have

applied that air accessible to him which would *certainly* have stopped his train, going *up grade*, in a shorter space, according to all the witnesses, than one-quarter of a mile.

A jury could reasonably conclude that it was the ordinary duty of Childress not to *jump off*, but to suppress his "*yellow streak*" long enough to apply that air, and if they so concluded then they must trace the last negligence to defendant as the proximate cause of the injury.

Shea, rear conductor, on this question, said: "We had three cars and a caboose and were running up hill. A train running twelve miles an hour with that number of cars, should the air be applied, would stop within *one hundred and fifty or two hundred feet.*" (Rec., p. 62).

Remember, that both he and Swick place the speed of their train at less than twelve miles an hour at time of collision. He further says: "When I realized we were going to have a collision, we were right on him; (evidently nearer than when Childress so realized it), *if the air had been applied in emergency at the time I discovered we were about to have a collision*, we would not have hit them as hard as we did." (Rec., p. 63).

The Court: "So that if the engineer had been where your caboose was, or the engineer having command of the air, had applied it at the time you saw the train in front of you, or a minute or two before the accident, it might have been avoided or lessened in degree?"

Answer: "Yes, it might." (Rec., p. 63).

We think it useless further to cite evidence on this question. This witness in reply to both Court and counsel states that if air had been applied in emergency, the collision would not have been as hard and might have been avoided. A jury could hardly conclude otherwise than that this last negligence of defendant was the nearest in cause to the injury.

Finally, we submit upon the whole record, that even if it be argued that Dashiel violated a rule or was contributorily negligent, yet that the collision might have been avoided if the conduct of the rear employees in the premises had been commensurate with ordinary prudence, and that hence this verdict and judgment under the evidence, are correct and that any charges given or refused on the question of rule violation become immaterial to the decision hereof.

FINAL ARGUMENT.

Upon the whole case we urge that the verdict and judgment were right. A young man, just in the domain of profit and usefulness for himself and others. During the ten months of his service for defendant, before this accident, strictly upright and sober. Such a thorough bright and intelligent railroad man, that within less than eight months from the time of his employment, he is promoted in the service from brakeman to conductor by his superintendent, and that, too, over other and older men in the service. (Ward's testimony, Rec., p. 68.)

Neighbors, friends, relatives, with one accord, all say that his appearance, conduct, etc., are such and so changed that they do not hesitate to pronounce him unsound of mind. Many good physicians unite in declaring him mentally deranged. Found by Doctor Mullins to be practically blind in one eye. (Rec., pp. 28-29.)

A physical wreck, with mental and nervous health completely shattered. Often while trying to work, and at other times, seen holding and pressing his aching head in his hands. Nearly all the lonesome night, while others around are surceased in slumber, relaxing from the day's toil and being refreshed for the morrow's battle, he is seen tossing from side to side, his sleep but fitful, or sitting on beside, aching head pressed in hands and trying

to moan away his pains and mental distress. This sleepless, restless victim of the incaution of others—can a hell on earth more than picture his unfortunate state? As helpless as a babe as to self-support and protection, during the useless remainder of his life, he must be cared for and protected, if at all, by friends and relatives. Parsimonious must be the purse, conceding not to this man that the amount of the award is but small compensation for the injuries suffered and to be endured.

Respectfully submitted that the verdict and judgment below were correct, and we ask an affirmance thereof.

Attorney for G. H. Dashiel, Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 212.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

GEO. H. DASHIEL, DEFENDANT IN ERROR.

Supplemental Brief and Argument for Defendant in Error.

MAY IT PLEASE THE COURT: Not having seen opposing brief until about time this cause was submitted, we reply in this supplement to some positions taken in said brief.

The record shows that in the trial below the release was first plead and exhibited on the day trial began (Rec., pp. 7, 15); that when so filed defendant in error thereto replied, as shown by the Record, pages 7–13; that one reply was of mental incompetency to execute release (Rec., pp. 9–10), and another that injuries to his skull, brain, and eye were *unknown* to both parties when release was executed (Rec., pp. 11–12). Opposing brief states that Dashiel (p. 4 of Brief) at trial abandoned issues of mental incompetency and of mistake as to his injury and offered no proof thereon.

Such statement is not warranted by the record. On the contrary, both parties offered testimony on those issues.

First. On issue of incompetency, see testimony of Mrs. Dashiel (Rec., p. 44); of Whitsitt (Rec., pp. 46–47); of Redford (Rec., pp. 33–34); of Naylor (Rec., p. 39); of Lane (Rec., p. 40); of Shahan (Rec., pp. 38–39).

Second. Did defendant in error abandon issue that *neither* party knew his skull was fractured and insanity and serious injury consequent thereon when he executed release? The statement has no foundation in the record. That such injuries were unknown and not contemplated by either party in the settlement is shown by *undisputed* evidence. Dr. Saunders, company surgeon (Rec., pp. 69–70), said that the injuries he found soon after accident were superficial and slight; that insanity could not result therefrom; that he did not find skull-bone *broken*. "That insanity would not result from a scalp wound," the *character* of injury described in release by plaintiff.

Hence, as to this company agent, there was a mistake of a *past and present fact*, the existence of a serious injury when release was executed. Dr. Frost on night of injury saw plaintiff for only a short time. He states: "Injury I found" (he is speaking of "scalp wound") "was on left side of head. *At that time* I did not think that would amount to *much*" (Rec., near bottom of p. 30). He further says that "only a *scalp wound* would not produce insanity" (Rec., p. 31, near middle). He did not regard scalp wound *commensurate* with skull fracture.

Ward did not know that plaintiff's skull was fractured when plaintiff described injury as *scalp wound* to the best of his *knowledge* (Rec., p. 66, near middle of page). To the effect that plaintiff appeared not injured.

It is conclusive, we think, that Dashiel was wholly ignorant of a serious head injury, from his statement to Ward that he would be "able to work in a day or two" (Rec., p. 66). August 13, 1901, Dashiel applied to a railroad for employment (Rec., p. 81). He states in the application that "I

never had any bones broken" (Rec., p. 82). Besides, said application shows that his eyesight was then considered good. This application having been introduced by the railroad, the statement therein concerning plaintiff's want of knowledge of his fractured skull, even long after release was executed, was certainly viewed by the trial court as strong proof that plaintiff was *ignorant*, as alleged in said plea No. 3, of his serious injury.

The railroad contending that no *serious* injury when release was signed, or at any other time, was known, and Dashiel urging that he was seriously injured in his skull and head when he signed, but that such fact was wholly *unknown* to him at the time, it was certainly proper for the court, upon the foregoing and other testimony in the record, to find peremptorily that there had been a mistake of fact as to a serious injury and of serious consequence to the injured man.

There is no evidence in the record showing that either party had any knowledge that his skull was fractured (a past and present fact) when he signed release.

We urge that the court upon the undisputed testimony, even independent of the terms of the instrument, did not err in construing same as not including the injuries for which plaintiff sought damages, and in telling the jury that injury to skull, brain, and eye was not intended by the parties to be released. The pleadings authorized him to hear testimony on such issue. He could but reach the conclusion (and could so inform the jury) that the serious injuries were not known and contemplated when release was signed. He was warranted to construe the release, either in connection with the matters on its face or independent thereof, *as not including* fracture of the skull and consequent results.

That Dashiel's skull was fractured and that insanity and loss of eye therefrom resulted, see testimony of Dr. Harper (Rec., pp. 36–37), Dr. Bordus (Rec., p. 32), Dr. Pring (Rec.,

p. 25), Aber (Rec., p. 25), and there is other testimony of like effect.

Contention of plaintiff in error that trial court, in construing the release and in submitting matter of injury to the jury, was guided only by matters upon the face thereof is not consistent with the pleadings and with said evidence concerning the character of the injuries *known* to exist when release was executed and thereafterwards.

Where the face of an instrument (as we believe does the one herein) shows that the specific injuries set out are of a certain *character*, and are so described, and are within the "*knowledge*" of the releasor when he signs, then the trial court may, we think, from the face thereof, derive the intention of the contracting parties and so construe the instrument as truly to express their real intention.

But in such a case it by no means follows that the court may not go further and hear evidence touching the situation of the parties relative to what they *knew* or did *not know* concerning the *character* of injury they had in contemplation, and especially may such course be taken when there is a prayer to that effect in replication to a plea in bar, as herein appears. The whole record herein shows that trial court, acted not alone upon the face of the release, but in giving it a construction, did so in the light of testimony of both parties pertaining to the issues of fact set out in plaintiff's replications Nos. 1 and 3 (Rec., pp. 9, 10, and 11).

The release was practically the last offered testimony (Rec., pp. 76 and 77). When so offered the court held that plaintiff was not deranged at time of its execution to such extent as to avoid release entirely. His remarks "because that release has not been set aside" makes it plain, we think, that he had permitted the parties to introduce testimony relative to the issue of fact raised by replication No. 1 (Rec., pp. 9–10), and is further shown by the testimony above referred to.

We think it clear that the court had considered all testi-

mony of both parties concerning the injury to skull, brain, and eye not having been known when release was executed, and that he considered same not only in connection with the *intention* to be deduced from face of the instrument itself but also as viewed in the light of our special answer No. 3 and evidence adduced thereon (Rec., p. 11).

On page 107 of record court says:

"The plaintiff by supplemental petition and *answer* to defendant alleges that the release made by him was for certain of the injuries so suffered, but did not include the injury occasioned to his mind nor the injury occasioned to his left eye by reason, &c. That these latter injuries were not in *contemplation* of the parties at the time the contract of release was entered into, and the defendant's liability therefor, is not released by said contract."

This language, in stating the issue of injuries, is substantially a copy of said plea No. 3 (Rec., p. 11).

So that if this court should hold that it would have been error to have construed the release as not intending by its face and terms to settle for the fracture of skull and serious injuries therefrom shown to have resulted, yet we think that a careful reading of the record will convince your Honors that the court was not *controlled alone* by the bare face of the instrument, but that his ruling in the admission of evidence, his remarks when the release was offered in evidence, "that release has not been set aside," &c., his said statement of the issues of injuries in his charge—from all these it is apparent that his Honor had in mind also the fact that neither party knew plaintiff had received the skull and brain injury when release was signed, as was alleged in our plea No. 3.

We call your attention to case of Shook *vs.* Ry. Co., 115 Fed. R., pp. 57–64. The issues of fact therein attempted to be raised were tendered by substantially the same character of pleading as herein shown.

On question of pleading, especially, the case is most applicable here.

Ry. Co. v Harris, 158 N.C.R. 326-332

The case of Queebe *vs.* Ry. Co., cited in opposing brief, we think, does not materially conflict with case at bar.

It refers to McCarty *vs.* Ry. Co., 94 Tex., p. 298, as a sustaining decision. It is remarkable that McCarty case, both in trial court and in Circuit Court of Appeals, was urged by plaintiff in error as against our contention that the face of the release, relative to the particulars specified, might be considered in *deducing the intention* of the parties as to what they contemplated while releasing.

If the Queebe case means to hold that particular specifications of injury cannot be regarded as qualifying a general clause of release and cannot be considered in arriving at the intention of the parties concerning the character of the injuries settled for, then the decision conflicts with the McCarty case, with many of the best works on contracts, with the common-law decisions, and is, in our humble judgment, unworthy of being applied against us here.

But we think, upon one point at least, that if there was no other case cited here by either party, the Queebe case would not demand a reversal of this judgment.

Its language, as shown near the bottom of page 18 of opposing brief, is what we have in mind, to wit:

"We repeat that what we have thus far considered is the application of the rule of construction by which the legal meaning of the release is to be ascertained, and not the principles governing in cases where such instruments are sought to be set aside or *restricted* in their operation on grounds of fraud or *mistake*." (Italics are ours.)

Opposing brief lays some stress upon a letter of Dashiel to Ward (Rec., p. 77) as indicating that, before executing release, he knew his skull was fractured, and that therefrom his brain and eye were in danger of derangement and loss. The whole of the letter is not quoted. Plaintiff therein states that his *back* and *shoulder*, not his *head* and *skull*, had troubled him.

We repeat, the undisputed testimony shows that neither party knew plaintiff's skull, brain, and eye were injured when he stated *the certain* personal injuries to the best of *his knowledge* and of the *character* described.

We respectfully submit that justice has been done by the verdict and the judgments below, and we ask for an affirmance hereof.

BEN. M. TERRELL,
Attorney for Defendant in Error, G. H. Dashiel.

Note: We invite attention to language of Civ. Court of Appeals in discussing dependants request for a peremption instruction (Rec p 109)

Respectfully
Ben M Terrell,
atty for Washies.

OPINION

Supreme Court of the United States.

No. 212.—October Term, 1904.

The Texas and Pacific Railway Company, Plaintiff in Error, *vs.* George H. Dashiell.	In error to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 29, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

This action was originally brought in the District Court of Tarrant County, in the State of Texas, and removed by the railway company to the United States Circuit Court for the Northern District of Texas on the ground that the railway company is a corporation under the law of the United States. The trial resulted in a verdict for the defendant in error for the sum of $7,500, upon which judgment was entered. It was affirmed by the Circuit Court of Appeals.

The action was for personal injuries sustained by defendant in error through the negligence of the railway company. The defendant in error was a conductor on one of the company's freight trains, with which another train collided, "whereby," it is alleged," plaintiff was seriously, painfully and permanently injured in many parts of his body and especially was he so injured in and about the head, eyes, back, sides, arms and shoulders, and in the organs and functions of his brain and in his entire mental and nervous system, and that as a result of said injuries plaintiff has, since the reception thereof, now is, and in the future will permanently be, helpless, injured and unsound of mind and body, and wholly incapable of transacting any kind of business or of doing any kind of mental or manual work, and that he now is and for the remainder of his life will be cared for and protected, if at all, by his friends and relatives."

And it is also alleged:

"That as a result of said negligence and collision plaintiff further says he was badly burned about the legs, sides, back, arms, hands and head, and that his left eye has become seriously affected by reason of said injury thereto, and by reason of said injury to his head and nervous system affecting said eye, in so much that the value, use and sight of said eye is now greatly impaired and almost entirely lost, and that the sight of his right eye is also now considerably weakened and impaired by reason of its sympathy for his said left eye. That as a result of said negligence and injury plaintiff now suffers, has suffered and for all his life will continue to suffer great physical pain and much mental anguish and pain."

Among other defences plaintiff in error pleaded a release executed by defendant in error on the 2d of February, 1901, which is as follows:

"Whereas on and prior to the 24th day of December, 1900, I, G. H. Dashiell, was employed by the Texas and Pacific Railway Co. as brakeman and extra freight conductor at or near Eastland, Texas, on the said 24th day of December, 1900, about 3.15 o'clock A. M. I sustained certain personal injuries in the manner and of the character described, to the best of my knowledge and ability, to wit:

"Extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm, and giving me a scalp wound.

"And, whereas, it is by said railway company and myself mutually desirable to maintain amicable and pleasant relations and avoid all controversy in respect to said matter:

"Now, therefore, to that end, and in consideration of thirty and no/100 dollars, to me now here paid in cash by said Texas and Pacific Railway Company, I hereby release and acquit, and by these presents bind myself to indemnify and forever hold harmless said Texas and Pacific Railway Company from and against all claims, demands, damages and liabilities, of any and every kind or character whatsoever, for or on account of the injuries and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing, or hereafter arising or accruing, in any way therefrom.

"It is expressly understood that, although we remain as free to contract with each other as if this transaction had not occurred, the Texas and Pacific Railway Company has not and does not agree to bind itself to employ me at or for any time, or in any capacity whatsoever.

"And it is also expressly understood, that all premises and agreements respecting or in any wise relating to the subject hereof, are fully expressed herein and no others are made or exist."

The plaintiff in error further pleaded that defendant in error remained in its service and employment for about three months, and did at said time and at all times thereafter ratify and approve the release and all of its terms and provisions.

To that part of the answer which pleaded the release, defendant in error demurred, and also answered alleging that (1) at the time of its execution and ratification, if it was ratified, he was of unsound mind; (2) He and plaintiff in error were mistaken as to the extent of his injuries and did not contemplate the result set out in his petition; (3) The release was without consideration.

These defences to the release were disposed of by the court as follows:

"On the question of the release of the defendant from liability for the injury sustained by plaintiff you are charged that the agreement entered into between the plaintiff and the defendant company, which has been introduced in evidence, is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof, to wit: injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to

have been received by him resulting in the impaired mental powers, and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action, and the consideration of which will be submitted to you in this charge."

This interpretation of the release was affirmed by the Court of Appeals, and presents the only question in the case.

Plaintiff in error contends that the release was intended "to be a final settlement of all claims growing out of the accident." The defendant in error contends that it was a settlement only of the particular injuries enumerated.

An instantly occurring objection to the contention of plaintiff in error is that if the release was a settlement of all claims growing out of the accident, why enumerate the particular injuries. The mere collision of the trains was of no consequence independent of the injuries which resulted, and it was for the injuries satisfaction was to be made, and satisfaction would be measured by the visible injuries, and because measured by them they would be enumerated. If the accident alone was settled for there was a more direct way of accomplishing it.

But let us analyze the release. It commences with the recital of the relation of defendant in error with plaintiff in error, and that he "sustained certain personal injuries in the manner and of the character described, to the best of his knowledge and ability." Then follows this: "Extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm, and giving me a scalp wound." For the injuries compensation was fixed at $30, with the additional consideration, let us say, in order to fully exhibit the contention of plaintiff in error, of the desire mutually entertained by him and defendant in error, (we quote from the release,) "to maintain amicable and pleasant relations and avoid all controversy in respect to said matter." Upon the word "matter" plaintiff in error puts its main reliance; indeed, makes it dominant of the meaning of the release. The contention is that it refers to the accident, not to the injuries, the latter serving only to identify the accident which "was the cause of action." This is an attempt to separate the inseparable. The negligence of plaintiff in error caused the accident which resulted in injuries to defendant in error and constituted his right or cause of action, and was the matter to which the release was addressed, but the extent of the release, whether confined to the injuries enumerated or includes other injuries, depends upon the other words of the release. They are as follows:

"I hereby release and acquit and by these presents bind myself to indemnify and forever hold harmless said Texas and Pacific Railway Company from and against all claims, demands, damages and liabilities of any and every kind or character whatsoever, for or on account of *the*

injuries and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing or hereafter arising or accruing in any way therefrom."

We may admit that there is some ambiguity in these words. The release is "of all claims of every kind and character whatsoever," arising, not from all injuries and damages sustained, but from "*the* injuries and damages sustained." That is the specific or enumerated injuries sustained "in the manner or upon the occasion aforesaid," and the results of those injuries. The words "in the manner and upon the occasion" are a mere tautological identification of the collision and cause of the injuries. They add nothing else whatever to the meaning of the release. This construction gives purpose to the enumeration of the injuries and to all of the provisions of the release. And the rule of construction should not be overlooked that general words in a release are to be limited and restrained to the particular words in the recital. The rule is illustrated by the case of *Union Pacific Railway Company* v. *Artist*, (60 Fed. Rep. 365.) Artist was an engineer in the employ of the company and sustained injuries while switching cars. The release passed upon recited that it was "For amounts agreed upon in settlement of claim of Andrew S. Artist against the Union Pacific Railway Company on account of injuries received." The injuries were specified, and the release recited "settlement is in full of all claims and demands of every character," and concluded with a release "of all manner of actions, cause of action, suits, debts and sums of money, dues, claims and demands, whatsoever in law or equity." Passing on the effect of the release, Circuit Judge Sanborn, speaking for the Court of Appeals of the Eighth Circuit, applied the rule, citing *Jackson* v. *Stackhouse*, (1 Cow. 122, 126, and 2 Pars. Cont. 633 note.)

In *Lumly* v. *Wabash Railway Company*, (76 Fed. Rep. 66,) the rule was also applied by the Circuit Court of Appeals of the Sixth Circuit. The instrument enumerated the injuries received, released the railroad company "from all actions, suits, claims, reckonings, and demands for, on account of, or arising from injuries so as aforesaid received, and any, every and all results hereafter following therefrom."

Quebe v. *Gulf C. & S. F. R. R. Co.*, (97 Texas,) is cited in opposition. The case can be distinguished. Notwithstanding some of its expressions, we do not think it was the intention of the court to impugn the rule which qualifies general words by the particular words in a recital. The trial court submitted to the jury as a question of fact whether the release was intended to be confined to the injury mentioned in the release. Quebe contended that the release was so confined as a matter of law. The Supreme Court, replying to it, said that the intention was "to release the cause of action rather than to acknowledge receipt of payment for a part of the damage." The court admitted the existence of the rule of construction

relied on, and that it was supported by many authorities, but used language which seemed to confine it to cases where the release is attacked on the ground of mistake or fraud, and not to apply it when the interpretation or construction of language of a release is under consideration. This is certainly a doubtful limitation of the rule. The purpose is not to set aside or reform an instrument, but to ascertain its scope and meaning. In the case at bar, however, mistake is charged, and there is evidence tending to show that defendant in error's skull was fractured, and it was from that the impairment of his sight and mental powers resulted. Such effects, the testimony tended to show, could not result from a simple wound to the scalp. There was testimony going to show, therefore, that the injuries to defendant in error's skull, brain and eye were not known to the parties when the release was executed, and that his impaired mental powers and loss of sight were the results of those injuries, and not the result of those which were enumerated.

In *Union Pacific Railway Co.* v. *Harris*, (158 U. S. 326,) a written release was set up in bar of an action for damages against the railway company. Several defences were made to the release, among others, "that the minds of the parties never met on the principal subject embraced in the release, namely, the damages for which the action was brought." This defence was complicated in the instructions of the court with the defences of fraud and mental incompetency to understand the terms and extent of the release, and it is difficult to make satisfactory extracts from the charge of the trial court. Enough, however, appears to show that the court submitted to the jury the fact of mistake of injuries received as bearing on the effect of the release, and this action was affirmed by this court.

It follows from these views that judgment should be and it is

Affirmed.

Mr. Justice BREWER, Mr. Justice BROWN and Mr. Justice PECKHAM dissent.

True copy.

Test:

Clerk Supreme Court, U. S.